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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 500

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JACOB L. SHERWOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 11, 1940

CERTIORARI GRANTED NOVEMBER 18, 1940

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SUPREME COURT OF THE UNITED STATES —

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1 In United States Circuit Court of Appeals for the Second Circuit

JACOB L. SHERWOOD, PLAINTIFF-APPELLANT

against

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE AND FREDERICK M. KAISER, DEFENDANT

Statement under rule 13

The above-entitled action was commenced by the filing of summons and complaint on or about April 1, 1939.

No answers have been interposed by either of the defendants. By notice of motion dated April 25, 1939, defendant The United States of America moved to dismiss the complaint herein, which motion was withdrawn by stipulation in open court upon condition that the above-entitled action be consolidated with the action pending in this court entitled "United States of America against Frederick M. Kaiser et ano.", and an order to that effect was entered on May 15, 1939.

Thereafter said stipulation and order of May 15, 1939, were vacated after motion made and the motion to dismiss the complaint made by defendant The United States of America was heard de novo.

The order dismissing the complaint herein was entered on November 22, 1939, and the appeal taken on December 22, 1939.

2 In United States District Court, Eastern District of New York

[Title omitted]

Notice of appeal.

SIR: Please take notice that the plaintiff, Jacob L. Sherwood, hereby appeals to the United States Circuit Court of Appeals of the Second Circuit from the order made and entered in the United States District Court for the Eastern District of New York on or about the 22nd day of November, 1939, dismissing the complaint of said Jacob L. Sherwood, and said plaintiff appeals from each and every part of said order, as well as from the whole thereof.

Dated, New York, November 27th, 1939.

Yours, etc.,

M. CARL LEVINE, MORGULAS & FOREMAN,

Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York City.

To: Harold M. Kennedy, Esq., United States Attorney, 271 Washington Street, Brooklyn, New York.

In United States District Court, Eastern District of New York

[Title omitted.]

Order appealed from

The defendant The United States of America having duly moved for an order for the dismissal of the complaint, and said motion having come on regularly to be heard on the 11th day of October, 1939,

Now, on reading and filing the notice of motion dated September 19, 1939, and the affidavit of Hyman H. Goldstein, verified the 19th day of September, 1939, in support of said motion, and the affidavits of Jacob L. Sherwood and Milton U. Copland, verified on the 2nd day of May, 1939, and October 6, 1939, respectively, in opposition to said motion, and after hearing Harold M. Kennedy, United States Attorney, and Hyman G. Goldstein, of counsel, in support of said motion, and M. Carl Levine,
4 Morgulas & Foreman, Esqs., Milton U. Copland, of counsel, in opposition thereto, and due deliberation having been had,

Now, on motion of Harold M. Kennedy, United States Attorney for the Eastern District of New York, attorney for the defendant United States of America, and on the memorandum of the Court filed herein, it is

Ordered, that the motion of the defendant be, and the same hereby is, granted.

Dated, Brooklyn, New York, November 22, 1939.

ROBERT A. INCH,
United States District Judge.

In United States District Court, Eastern District of New York

[Title omitted.]

Notice of motion to vacate, etc.

SIRS: Please take notice that the undersigned will move this Court at a Special Term for the hearing of motions, to
5 be held at the Courthouse thereof, Postoffice Building, 271 Washington Street, Borough of Brooklyn, City of New York, on the 27th day of September, 1939, at 10:30 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order directing the setting aside and vacating of an

order of this Court dated May 15, 1939, which consolidated the action on file in this Court bearing Docket No. Civil 309 with another action pending in this Court under Docket No. Civil 177, and for an order directing the dismissal of the complaint of Jacob L. Sherwood herein on the ground that the complaint fails to state a claim upon which relief can be granted.

Dated, Brooklyn, New York, September 19, 1939.

Yours, etc.,

HAROLD M. KENNEDY,
United States Attorney, Eastern District of New York,
Office and P. O. Address, 519 Federal Building,
Brooklyn, New York.

To: N. Carl Levine, Esquire, Morgulas & Foreman, Esquires, 521 Fifth Avenue, New York, New York.

6 In United States District Court, Eastern District of New York

[Title omitted.]

Affidavit of Hyman H. Goldstein, read in support of motion

EASTERN DISTRICT OF NEW YORK, *ss:*

Hyman H. Goldstein, being duly sworn, deposes and says: That he is an Assistant United States Attorney for the Eastern District of New York duly appointed according to law. That he is in charge of the above litigation and is familiar with all of the facts involved as a result of the inspection by him of the official records and correspondence forwarded to him by the Attorney General of the United States.

On January 27, 1933, Frederick M. Kaiser, one of the defendants in the above entitled action, entered into a contract in writing with the United States of America wherein he agreed to furnish all labor and materials and perform all work required for the construction of the Post Office at East Greenwich, Rhode Island. The price fixed for said contract was $47,272.29. The work was to commence after the date of receipt of notice to proceed, and was to be completed within 473 calendar days.

On January 28, 1933, the Fidelity & Deposit Company of Maryland executed a performance bond in the penal
7 sum of $24,000.00 in favor of the Government, conditioned upon the performance of said contract by the said Frederick M. Kaiser.

On February 6, 1933, the said Frederick M. Kaiser received notice to proceed. Article 9 of said contract provided that if the contractor refused or failed to prosecute the work with such

diligence as would insure its completion within the time specified, the Government might by written notice to the contractor terminate his right to proceed with the work, in which event the Government might take over the work and prosecute the same to completion, and hold the contractor and his surety liable for any excess cost.

On September 25, 1933, the Government notified the contractor, defendant Kaiser, that his right to proceed under the contract was terminated as of that date, due to unsatisfactory progress made thereunder. Notice was also given to the surety.

On October 28, 1933, at the request of the surety, the right of the contractor, the defendant Kaiser, to proceed with the work, was restored, and the surety's formal consent to such restoration was given November 16, 1933.

On the 16th day of November, 1933, the following stipulation and consent was executed by the defendant Kaiser and his surety, the Fidelity and Deposit Company of Maryland:

"Stipulation and Consent (1st)

"Whereas, on January 28, 1933, Frederick M. Kaiser of New York, New York, as principal, and the Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, as surety, entered into a bond to the United States of America in the penal sum of $24,000.00 conditioned for the performance by said principal of his contract
dated January 27, 1933, for construction, including
8 approaches, retaining walls, mechanical equipment, et cetera, of the Post Office at East Greenwich, Long Island;

"Whereas, on September 23, 1933, the Secretary of the Treasury having been advised that said principal had failed to make satisfactory progress on the work in accordance with the provisions of said contract, the right of the said principal to proceed with the work was terminated;

"Whereas, thereafter, representatives of the Government, said principal and said surety conferred relative to the possibility of reinstating the right of said principal to proceed with the work, and on October 17, 1933, said surety requested that the termination of said principal's right to proceed be withdrawn and that said principal be permitted to resume the work at as early a date as possible in order to get the building under cover before the winter weather sets in, as an agreement had been reached by both of said parties whereby said principal has deposited with a trust company, which both of said parties have named in New York, New York, the sum of $3200.00 in cash, with the understanding that no part of this amount will be used for any job

other than the aforesaid contract, or for any other purpose, without first obtaining said surety's consent, and as a result of the foregoing the Treasury Department by letter addressed to said principal on October 28, 1933, revoked its action in terminating said contract and agreed to allow said principal to proceed with the work on the condition that this action is without prejudice to any and all rights of the United States under the said contract and that the time for completion of all work embraced in said contract shall be 33 calendar days (from September 25, 1933, when said principal's right to proceed was
9 terminated after the date of this restoration) in addition to the time originally specified and previously approved; all to be in strict accordance with the letter addressed the Treasury Department on October 17, 1933, by said surety and the Treasury Department's letter dated October 28, 1933, and in accordance generally with the terms of said contract (copies of which said letters are hereto attached and are hereby made a part hereof):

"Now, therefore, it is hereby stipulated and agreed by the said principal and surety that both of them hereby consent and agree to remain bound on said bond dated January 28, 1933, for the performance of said contract after same has been or may be modified to the same extent as though the right of the said principal to proceed with said contract had not been terminated.

"Signed, sealed and delivered this 16th day of November, 1933.

[SEAL] "FREDERICK M. KAISER.

[SEAL] "FIDELITY AND DEPOSIT COMPANY OF MARYLAND."

The contractor, the defendant Kaiser, was authorized to proceed with the work on December 16, 1933. No work was performed by the said defendant Kaiser subsequent to the restoration of the right to proceed and on January 26, 1934, the said defendant Kaiser and the surety were again notified of the termination of his right to proceed. The surety notified the Government on April 4, 1934, that it did not elect to complete the work.

Bids were solicited and the contract to complete the work was awarded to DiSandro Brothers, $42,800.00 and the work was completed August 2, 1935. The defendant Kaiser had in the meantime received $10,422.00 in progress payments. The Government thereby incurred a loss of $15,861.85.

10 An action was commenced by the Government in the United States District Court for the Eastern District of New York against this contractor, the defendant Frederick M. Kaiser, and his surety, the Fidelity & Deposit Company of

Maryland, on January 17, 1939, to recover the sum of $15,861.85. The docket number is Civil 177. Both of these defendants have appeared in this action, filed their answers and demanded a jury trial.

On January 20, 1939, Jacob L. Sherwood filed an action in the United States District Court for the Eastern District of New York as assignee of Frederick M. Kaiser against the United States of America for $10,000.00. The docket number is Civil 180. The complaint was verified by the plaintiff Sherwood and alleged an assignment from Frederick M. Kaiser to him of the said Kaiser's claim to damages by reason of what he alleged was the Government's breach of its contract. The petition failed to state the date of the assignment nor the consideration therefor nor did it set forth the manner of its execution and failed to attach a copy thereof. In every particular it failed to comply with the provisions of Section 3477 of the Revised Statutes (31 U. S. C. A. 203). The statute above referred to expressly provides that all transfers, assignments and powers of attorney, made of any claim upon the United States, "shall be absolutely null and void" unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such claim, the ascertainment of the amount due and the issuing of a warrant for the payment thereof. The statute further provides that the assignment or the power of attorney or transfer must recite the warrant for payments and must be acknowledged by the person making them before an officer having authority to take acknowledgments. It should be certified by the officer, who shall read and fully explain the transfer, assignment or warrant of attorney to the person acknowledging the same at the time of the acknowledgment.

11 Your deponent communicated with the attorney for the plaintiff and informed him that unless this action is discontinued a motion for its dismissal will be made. Then, for the first time, deponent was informed that the plaintiff was a judgment creditor of the said Kaiser and that a motion will be made to amend the complaint to bring in Kaiser as a defendant so that instead of proceeding solely on the theory of assignment it will be bolstered by the pretense of a judgment creditor's action against a third party in accordance with the provisions of Section 795 of the Civil Practice Act of the State of New York. Such a motion was subsequently made.

Your deponent had a conversation with Frederick M. Kaiser, the defendant, subsequent to the date of the service of the motion to amend. Mr. Kaiser informed your deponent that Sherwood was in fact his partner, having advanced monies to him to proceed with the contract in the expectation of sharing in the profits

thereof; that he had permitted Sherwood to obtain a default judgment against him and had subsequently made a full assignment of his claim against the Government to Sherwood; that Sherwood was to receive only $4,000.00 of any prospective recovery against the Government and the balance was to belong to Kaiser; that the same law firm now representing Sherwood was to represent him (Kaiser); that Sherwood never attempted to collect any part of the judgment against him, either by garnishee of his salary, execution or otherwise; that it was never contemplated that Sherwood was to sue the Government on the assignment and, to quote defendant Kaiser's words, "a fast one was put over on me."

Revised Statute, Section 951 (28 U. S. C. A. 774), as amended, provided as follows:

"In suits brought by the United States against individuals no claim for credit shall be admitted upon trial except such as appear to have been presented to the General Accounting
12 Office for its examination and to have been by it disallowed, in whole or in part, unless it is proved to the satisfaction of the Court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure and that he was prevented from exhibiting a claim for such credit at the General Accounting Office by absence from the United States or by some unavoidable accident."

The decisions are decisive that the answer must show the presentation and disallowance by the General Accounting Office of the claim.

U. S. v. Patterson, 91 F. 854.

No such claim was ever presented to the General Accounting Office, either by the defendant Kaiser or by the plaintiff Sherwood and no such allegation appears either in the complaint herein or in the answer filed by the defendant Kaiser in the action bearing docket number Civil 177 aforementioned.

It would appear to be clear that the defendant Kaiser would be barred in setting up such a defense by way of a satisfactory set-off and that his assignee, the plaintiff Sherwood, should likewise be barred for that reason.

Furthermore, it is clear that the execution of the stipulation and consent by the said Kaiser and his surety on November 16, 1933, above referred to, would operate as a waiver of any claim for damages theretofore incurred by the contractor Kaiser as a result of any alleged breach of the contract by the United States for, in that very instrument, both the principal and the surety stipulated and agreed to remain bound on the surety bond for the performance of the contract to the same extent as if the right of

the principal to proceed with the contract had not been terminated.

That deponent respectfully submits that this action is a subterfuge to get around the statutory inhibition against
13 assignments. The fact that the plaintiff is a judgment creditor does not alter the situation in any manner in view of the express statutory provision of Revised Statutes 3477 (31 U. S. C. A. 203) expressly prohibiting such an action. What he cannot do directly as an assignee, the plaintiff cannot do indirectly by means of a friendly judgment obtained by default.

While it is true that assignments by operation of law, such as the passing of a claim against the United States to a receiver or trustee in bankruptcy of the claimant, has been held to be not within the prohibition of Section 3477 of the Revised Statutes (31 U. S. C. A. 203), yet it is clear that the order under Section 795 of the Civil Practice Act of the State of New York is not such an assignment by operation of law within the meaning of these decisions. It is merely a right conferred upon a creditor by the laws of the State of New York, but such right cannot enlarge the liability of the United States or the terms upon which it has consented to be sued. Certainly Section 795 of the Civil Practice Act of the State of New York can confer no rights of suit as against the United States.

In the language of Judge Story, speaking for the Supreme Court of the United States in Spofford v. Kirk, 97 U. S. 484:

"It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It incapacitates every claimant upon the United States Government from creating an interest in the claim in any other than himself."

In Nutt v. Knut, 200 U. S. 12, Justice Harlan, speaking for the Supreme Court, said:

"The obvious purpose of the statute is to forbid anyone
14 who was a stranger to the original transaction, to come between the claimant and the Government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of the Government."

In National Bank of Commerce v. Dominie, 218 U. S. 356, the Supreme Court said:

"If any regard whatever is to be had to the intent of Congress, as manifested by its words, too clear, we think, to need construction, we must hold such a transfer to be absolutely null and void. Any other holding will effect a repeal of the Statute by mere

judicial construction, in disregard of the plain, unequivocal intent of Congress, as indicated by the Statute. * * *"

The words of that section are so clear and explicit that there cannot be, we think, any reasonable ground to doubt the purpose of this legislation. Congress had in mind all transfers and assignments of any claim on the United States or part of a claim or any interest therein. There must be a compliance with the conditions fully set out in the statute.

In Martin v. National Surety Company, 300 U. S. 588, Judge Cardozo, speaking for the Supreme Court, said:

"The Government was at liberty to hold the money back until demanded by the contractor personally, disregarding any assignment or power of attorney for its payment to another. * * * The provisons of the Statute making void an assignment or power of attorney by a government contractor are for the protection of the Government. * * * In the absence of such a rule the Government would be in danger of becoming embroiled in conflicting claims with delay and embarrassment, and a chance of multiple liability."

On March 9, 1939, Judge Marcus B. Campbell denied the motion of the plaintiff, Jacob L. Sherwood, to amend and to file an amended complaint and held that the Government would be entitled to a dismissal of the complaint as the assignment was null and void. He stated that in his opinion "the right to a dismissal of the complaint cannot be questioned and it is mandatory upon the Court to dismiss it. It, therefore, seems to me that the plaintiff should not be allowed to defeat the right of the Government to a dismissal by an amendment, but, if the plaintiff can make out a case, it should be done in a new action." On March 30, 1939, an order was entered herein by Honorable Marcus B. Campbell, United States District Judge, denying the motion for leave to amend without prejudice to the bringing of a new action.

Thereafter, the said Jacob L. Sherwood instituted a new action under docket No. Civil 309. A motion to dismiss the said last mentioned action was made by the United States Attorney and came on for argument before Honorable Mortimer W. Byers on May 3, 1939, at which time your deponent and the attorney for Jacob L. Sherwood agreed in open Court to withdraw the motion and to consent to a consolidation of the action brought under d'cket number Civil 177 entitled "United States of America, plaintiff, vs. Frederick M. Kaiser and Fidelity and Deposit Company of Maryland, defendants," with the action under docket number Civil 309 entitled "Jacob L. Sherwood, plaintiff, against United States of America and Frederick M. Kaiser, defendants."

That thereafter and on May 11, 1939, a stipulation was entered into between the attorneys for Jacob L. Sherwood and your deponent providing for such consolidation and withdrawal of the motion to dismiss the complaint of Jacob L. Sherwood and
16 an order was entered on the said stipulation by Honorable Mortimer W. Byers on May 15, 1939.

Further examination and consideration by your deponent disclosed that the procedure thus followed was improper and ineffective to accomplish the purposes which prompted its adoption, since it was not a proper case for consolidation. The suit brought by the United States as plaintiff in Civil 177 involves the general jurisdiction of the District Court and is triable by a jury; the defendants Frederick M. Kaiser and the Fidelity and Deposit Company of Maryland have already actually demanded a jury trial, whereas the suit of Jacob L. Sherwood against the United States, Civil 309, is brought under the provisions of the Tucker Act and the Court in exercising jurisdiction under the Tucker Act sits as a Court of Claims and it is triable by the Court without a jury. (28 U. S. C. A. 41 [20].) This is an entirely separate and distinct jurisdiction from its ordinary one.

U. S. v. Pfitsch, 256 U. S. 547.

Furthermore, it is manifest that a suit by the United States to enforce a claim asserted by it cannot be consolidated with a suit against the United States under the Tucker Act. Even if we consider the Sherwood suit as a counterclaim the impossibility of trying it in connection with the main issue of the case at bar survives for the reasons above noted and in particular because under Revised Statutes, Section 951 (28 U. S. C. A. 774), the answer must allege presentation and disallowance by the General Accounting Office of the claim.

It has been further held that an affirmative judgment against the United States may not be awarded on a counterclaim on a suit brought by it.

United States v. Nipissing Mines Co., 206 Fed. 431 (C. C. A. 2nd).

17 Wherefore, your deponent respectfully prays for an order directing the setting aside and vacating of the order of this Court dated May 15, 1939, and for an order dismissing the complaint of Jacob L. Sherwood with cost.

HYMAN H. GOLDSTEIN.

(Sworn to September 19, 1939.)

In United States District Court, Eastern District of New York

[Title omitted.]

Affidavit of Milton U. Copland, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Milton U. Copland, being duly sworn, deposes and says: I am an attorney associated with M. Carl Levine, Morgulas & Foreman, the attorneys for the defendant Frederick M. Kaiser, and make this affidavit in opposition to the instant motion for a dismissal of the complaint of Jacob L. Sherwood.

18 By motion dated April 25th, 1939, which was returnable on May 31st, 1939, this same motion was made in an action entitled "Jacob L. Sherwood against United States of America and Frederick M. Kaiser." At that time two actions were pending—the action by the United States of America against Frederick M. Kaiser and Fidelity & Deposit Company of Maryland, and the action which was brought by our office as attorneys for Jacob L. Sherwood entitled "Jacob L. Sherwood against United States of America and Frederick M. Kaiser."

The aforesaid motion to dismiss was withdrawn by consent of the United States attorney in open Court on condition that the actions be consolidated inasmuch as the same subject matter was involved, and a written stipulation was thereupon entered into and approved by this Court.

The action brought by Sherwood was under the Tucker Act, and brought as a judgment creditor's action by virtue of the Civil Practice Act of the State of New York, Section 795, which permits a judgment creditor upon order of the Court to institute suit against a debtor of the judgment debtor. As Mr. Sherwood was a judgment creditor of Frederick M. Kaiser in the sum of approximately $5,000, the action was brought against the United States of America and Kasier on Kaiser's claim for breach of contract against the United States of America. The Supreme Court order provides for payment of Sherwood's judgment out of any moneys he might recover against the United States of America.

The motion made on April 25th, 1939, is identical up to the bottom of page 7 of the affidavit with the present motion. The Government now seeks to introduce a new reason for a dismissal in addition to its previous argument, to wit: that the two actions which were consolidated by consent were not properly consoli-

dated and therefore Mr. Sherwood's complaint should be
19 dismissed. There is no further ground set forth urging the dismissal of the complaint.

The United States Attorney's arguments are all directed to the point that the two actions which have been consolidated are brought on different grounds and under different conditions. The contention made now in effect is that the actions should not have been consolidated and is not addressed to the complaint of Sherwood, which was fully set forth in the previous motion made by the Government. The United States Attorney states that the suit brought by the United States is triable by jury, and that the suit of Mr. Sherwood under the Tucker Act is triable by the Court without a jury. This we are perfectly willing to admit, but the Court should look to the practicalities of the situation. The action brought by Mr. Sherwood is one in which he will derive all his rights from Mr. Kaiser's claim against the Government, which is exactly what will be involved in the present action. If the United States shows that Kaiser, the contractor, is wrong, they will obtain the judgment, but if Sherwood can show that the United States breached its contract with Kaiser, than he will be entitled to obtain through Kaiser that part of his judgment which is awarded by the jury. The claim of Sherwood is in reality a claim of Kaiser's against the United States, which is merely being brought in Sherwood's name under the provisions of the Civil Practice Act. Sherwood was not a party to the contract with the Government, nor with Kaiser, the contractor.

The moving affidavit does not set forth a single reason that was not set forth in the previous motion why Sherwood's complaint should be dismissed. Consolidation of the two actions, which was originally done on consent of all parties, would best serve the interests of expedition and would avoid circuity of suits. It is this consolidation which the United States Attorney originally consented to that he is in reality opposing so strenuously now.

20 Under the broad powers of the Court in consolidation it is respectfully submitted that the United States Attorney's arguments are unwarranted and unsupported by the law or the facts in this case. Although the stipulation of consolidation is dated May 11th, 1939, no motion was made, nor any intimation given, that the United States Attorney had reversed his position and was in effect asking for a reargument of his previous motion. Apart from objecting to the consolidation, all that the United States Attorney is doing in the present motion is asking for a reargument of the previous motion which he agreed to withdraw. This procedure is not only unwarranted under the facts in this

matter, but is contrary to the purport and regulation of the rules of this Court. However, if the Court should see fit to consider this motion, counsel respectfully begs leave to submit the affidavit of Jacob L. Sherwood and memorandum submitted on the previous motion.

Wherefore, your deponent respectfully prays for an order denying the instant motion with cost.

MILTON U. COPLAND.

(Sworn to October 6, 1939.)

21 In United States District Court, Eastern District of New York

[Title omitted:]

Affidavit of Jacob L. Sherwood, read in opposition to motion

STATE OF NEW YORK,
County of New York, ss:

Jacob L. Sherwood, being duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action, and makes this affidavit in opposition to the instant motion to dismiss the complaint herein.

That the instant action was commenced against defendants, The United States of America and Frederick M. Kaiser, pursuant to a Court order obtained under Section 795 of the Civil Practice Act. By this statute the judgment creditor, if the Court so directs, is given the right to maintain an action against a third party against whom the judgment debtor may have a cause of action. An order was procured in the Kings County Supreme Court, a copy of which will be submitted upon the argument of this motion, giving the judgment creditor, Jacob L. Sherwood, the right to bring the instant action. A copy of said order has heretofore been served on the United States Attorney, and said order is specifically referred to in the complaint herein.

22 The Court will note that although the action is brought to recover the sum of $10,000, your deponent's right is specifically limited in the Court order to the amount of his judgment and costs, the balance still being subject to further Court order.

It can readily be seen, therefore, that the instant action is not brought within the purview of Section 3477 of the revised statutes (31 U. S. C. A. 203) since this action is brought by operation of law, as distinguished from a voluntary assignment. Deponent has been informed by his attorney that a memorandum will be presented to the Court setting forth the law in this regard.

With respect to the allegation made in the moving affidavit, to the effect that your deponent was a partner of Kaiser, deponent wishes to emphatically deny any such statement. The judgment which was obtained against Kaiser was on moneys loaned to him in a sum exceeding $4,000. The judgment obtained here was by no means a friendly judgment, and an exhaustive examination in supplementary proceedings was had, which will be presented to the Court upon the argument covering six different occasions upon which the judgment debtor was examined. The only reason that no garnishee was issued was the fact that there was a prior garnishee outstanding against Kaiser's salary.

The statement made at page 6 of the affidavit, "That Sherwood was to receive only $4,000 of any respective recovery against the Government," in itself would refute the previous statement that your deponent was Kaiser's partner, inasmuch as the loan made by your deponent was well over this figure.

Your deponent emphatically states that there was never any partnership arrangement, that the moneys advanced to Kaiser were advanced purely as a loan, and that there is absolutely no basis in fact for any such statement by Kaiser.

23 Your deponent has been informed by his attorneys that in the answer of defendant Kaiser in the action brought against him by the United States of America, he has not set forth any affirmative defense or counterclaim against the United States of America. This fact refutes the statement of law set forth in the moving affidavit, that the purpose of the statute (31 U. S. C. A. 203) is to prevent a stranger to the original transaction coming between claimant and the Government. In the instant case, the only one who has a right to assert an affirmative claim against the defendant United States of America in the instant action is your deponent, by virtue of the Court order heretofore made and entered.

In view of the foregoing, it is therefore respectfully submitted that the motion be denied.

JACOB L. SHERWOOD.

(Sworn to May 2, 1939.)

In United States District Court, Eastern District of New York

JACOB L. SHERWOOD, PLAINTIFF

against

THE UNITED STATES OF AMERICA AND FREDERICK M. KAISER, DEFENDANTS

Complaint

Plaintiff, complaining of the defendants, by his attorneys, M. Carl Levine, Morgulas & Foreman, respectfully sets forth and alleges, upon information and belief:

24 For a First Cause of Action

First. That at all times hereinafter mentioned, the plaintiff and his judgment debtor, Frederick M. Kaiser, as hereinafter set forth, were and still are citizens of the United States of America; plaintiff resides at 35-31 88th Street, Borough of Queens, City of New York; plaintiff's judgment debtor, Frederick M. Kaiser, had his principal place of business at all the times hereinafter mentioned at 101 Park Avenue, Borough of Manhattan, City, County and State of New York, and resides at 1078 East 32nd Street, Borough of Brooklyn, City of New York; and that the plaintiff's residence is in the Eastern District of New York and within the territorial limits of this Court.

Second. That this Court has due jurisdiction of the parties hereto, and of the subject matter hereof, and to hear and determine the issues herein, and that this action arises under the Act of March 3, 1887, c. 359, Secs. 1, 2, 24 Stat. 505, and amendments thereto; U. S. C., Title 28, Section 41 (20).

Third. That prior to the making of the agreement hereinafter set forth, the defendant The United States of America duly appropriated the necessary funds for the payment of said agreement, and for the labor and materials hereinafter mentioned.

Fourth. That heretofore and on or about the 27th day of January 1933, plaintiff's judgment debtor, Frederick M. Kaiser, and the defendant, The United States of America duly entered into an agreement in writing wherein and whereby the said Frederick M. Kaiser agreed to construct and complete and to furnish all labor and materials, and to perform all work required

25 for the construction, including approaches, retaining walls, mechanical equipment, etc., of the post office at East Greenwich, R. I., all in accordance with the provisions of specification therein referred to, dated December 14, 1932, the adden-

dum thereto, dated January 3, 1933; and in accordance with general provisions and drawings therein referred to in said specification, and in accordance with the instructions of the defendant The United States of America, and its representatives, employees, and departments, and the defendant, The United States of America agreed to pay to the said Frederick M. Kaiser the sum of $47,300.00 in installments as the work progressed, and provision was made in said contract whereby the defendant, The United States of America was authorized to order and direct the said Frederick M. Kaiser to perform other work and furnish other material in connection with the aforesaid, at prices either to be agreed upon or at fair and reasonable prices; and all things and materials necessary and required for the making of said agreement, and the labor and materials hereinafter mentioned have been duly done and performed, and that the agreement and the labor and material hereinafter mentioned were duly authorized.

Fifth. That said Frederick M. Kaiser duly filed with the defendant The United States of America a bond required for the due performance by it of the terms and conditions of the said contract, and the same was duly approved and accepted by the defendant The United States of America.

Sixth. That thereafter, said Frederick M. Kaiser duly entered upon the performance of the terms and conditions of said agreement and duly proceeded with the performance of the terms thereof in a manner as called for by said agreement and did various parts of excavation work, re-enforcing work, foun-
26 dation work, masonry work, structural steel and iron work and various other work called for by said agreement and substantially sublet all of the different classes of work required by said specification, plans and contract to various subcontractors and was duly performing the terms and conditions thereof. That thereafter, and on or about September 25, 1933, the defendant The United States of America without just cause or warrant notified the said Frederick M. Kaiser to discontinue the work under said contract, and said defendant The United States of America unlawfully, and in violation of the terms of said contract, terminated the same.

Seventh. That the said Frederick M. Kaiser was at all times duly ready, able and willing, and duly offered to perform the terms and conditions of said contract on his part to be done and performed, except as he was prevented in his performance of the contract for the reasons that defendant The United States of America unlawfully required said Frederick M. Kaiser to furnish labor and material in a manner contrary to and in a manner which was not provided for by said contract; it improperly

rejected labor and material that had been properly performed and furnished; it failed to provide proper drainage; it furnished plans and specifications of an improper nature, unworkable and inadequate for the purpose for which they were prepared; it unreasonably and unlawfully delayed the said Frederick M. Kaiser in the performance of his contract, in the furnishing of his labor and material, in the furnishing of proper plan, specifications and details, and in the making of decisions; it arbitrarily and unreasonably made false interpretations of the plans, specifications and details; it improperly harassed and interfered with said Frederick M. Kaiser's performance of the work under the contract and made false, fictitious and arbitrary demands and rulings.

27 Eighth. That thereafter, and on or about December 16, 1933, defendant The United States of America notified said Frederick M. Kaiser that he had been reinstated and directed him to proceed with the work. That, nevertheless, the defendant The United States of America acted unreasonably, unlawfully, arbitrarily and in violation of the terms of said contract in that it refused to permit said Frederick M. Kaiser to proceed with said work, unless and until he complied with certain conditions, which conditions were unreasonable, arbitrary, and contrary to the terms of said contract.

Ninth. That thereafter, and upon said Frederick M. Kaiser's refusal to comply with the arbitrary, unreasonable and unlawful conditions as aforesaid, and on or about January 26, 1934, the defendant The United States of America notified said Frederick M. Kaiser, in violation of the terms of said contract, that his right to proceed under his contract was terminated, and said contract was thereby terminated.

Tenth. That by reason of the aforesaid, the said Frederick M. Kaiser has been damaged in the sum of Ten Thousand ($10,000.00) Dollars.

Eleventh. That by order of the Supreme Court, Queens County, the plaintiff herein has been duly authorized and empowered to maintain this action as a judgment creditor of said Frederick M. Kaiser, nunc pro tunc as of September 1st, 1937.

Twelfth. That, upon information and belief, no other person or corporation has any interest therein, and no assignment or transfer of the claim, or any part thereof, or interest therein, has been made by said Jacob L. Sherwood, nor has any other order of any Court been issued authorizing the bringing of any other action on this claim.

28 Thirteenth. That Frederick M. Kaiser and plaintiff have at all times duly borne true allegiance to the Government of the United States, and they have not in any way voluntarily

aided, abetted, or given encouragement to rebellion against said Government.

Fourteenth. This suit is brought within six years after the right accrued for which the claim is made.

As and for a Second Cause of Action

Fifteenth. Plaintiff repeats, reiterates and realleges the allegations contained in paragraphs "First", "Second", "Third", "Fourth", "Fifth", "Sixth" and "Seventh" of this petition and complaint, with the same force and effect as though the same had been fully repeated and fully set forth herein.

Sixteenth. That during the course of the performance of said contract by the said Frederick M. Kaiser, the defendant The United States of America unlawfully and in violation of the terms of said contract demanded and required said Frederick M. Kaiser to perform certain labor and furnish certain material not called for by said agreement between the defendant The United States of America and said Frederick M. Kaiser made on the 27th day of January, 1933, as aforesaid, and by reason of such demands said Frederick M. Kaiser was compelled to and did perform other labor and furnish other material under protest, to his damage.

Seventeenth. That the defendant The United States of America failed and refused to pay for the labor and materials performed and furnished by the said Frederick M. Kaiser in accordance with said demand by the defendant The United States of America by reason of which said Frederick M. Kaiser was damaged in the sum of $3,085.45.

29 Eighteenth. That by order of the Supreme Court, Queens County, the plaintiff herein has been duly authorized and empowered to maintain this action as a judgment creditor of said Frederick M. Kaiser nunc pro tunc as of September 1st, 1937.

Nineteenth. That Frederick M. Kaiser and plaintiff have at all times duly borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Twentieth. This suit is brought within six years after the right accrued for which the claim is made.

As and for a Third Cause of Action

Twenty-first. Plaintiff repeats, reiterates and realleges the allegations contained in paragraphs "First," "Second," "Third," "Fourth," "Fifth," "Sixth," and "Seventh" of this petition and

complaint, with the same force and effect as though the same had been fully repeated and set forth herein.

Twenty-second. That the defendant The United States of America violated the terms of said contract in that it unreasonably, arbitrarily, unlawfully and in bad faith delayed said Frederick M. Kaiser in the performance of his contract and the doing of the work to be done thereunder in that, amongst other things, defendant The United States of America compelled said Frederick M. Kaiser to perform quantities of work not contemplated by the original contract; in that it made wrongful interpretations of the contract, plans and specifications; in that it delayed the approval of the work to be performed by the said Frederick M. Kaiser; in that it failed to provide proper drainage; in that it furnished plans and specifications of an improper nature, unworkable and inadequate for the purpose for which they were prepared; in that it unreasonably and arbitrarily made false interpretations of the plans, specifications and details; in that it unreasonably, unlawfully and arbitrarily required said Frederick M. Kaiser to do certain of the work at a time and in a manner not required or contemplated by the contract documents; all of which interfered with, prevented and delayed said Frederick M. Kaiser in the performance of his contract.

Twenty-third. That by reason thereof said Frederick M. Kaiser has been damaged in the sum of $1,360.04.

Twenty-fourth. That by order of the Supreme Court, Queens County, the plaintiff herein has been duly authorized and empowered to maintain this action as a judgment creditor of said Frederick M. Kaiser, nunc pro tunc as of September 1st, 1937.

Twenty-fifth. That Frederick M. Kaiser and plaintiff have at all times duly borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said Government.

Twenty-sixth. This suit is brought within six years after the right accrued for which the claim is made.

Wherefore, plaintiff prays for judgment against the defendant The United States of America for the sum of Ten Thousand ($10,000) Dollars.

M. Carl Levine, Morgulas
& Foreman,
By Albert Foreman,
Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, City of New York.

(Verified by Jacob L. Sherwood, March —, 1939.)

31 In United States District Court

Opinion of Inch, D. J.

The stipulation no longer exists and the order of May 15, 1939, has been duly set aside by Judge Byers. The motion to dismiss is therefore left free from the above. The attempt at an assignment is vain as the alleged transfer is void because it is premature—R. S. 3477. There has been no assignment by law—accordingly the motion to dismiss complaint of Jacob L. Sherwood is granted.

ROBERT A. INCH,
U. S. D. J.

OCTOBER 20, 1939.

In United States District Court, Eastern District of New York

Stipulation as to record

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

Dated, New York, February 15, 1940.

M. CARL LEVINE, MORGULAS
& FOREMAN,
Attorneys for Plaintiff-Appellant.
HAROLD M. KENNEDY,
United States Attorney,
Attorney for Defendant-Appellee.

32 [Clerk's certificate to foregoing transcript omitted in printing.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 306—October Term, 1939

(Argued May 3, 1940. Decided June 3, 1940)

JACOB L. SHERWOOD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York

Action by Jacob Sherwood against the United States of America and Frederick Kaiser. From an order granting a motion of the United States of America to dismiss the complaint, plaintiff appeals. Reversed.

Before L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

Milton U. Copland, of New York City (M. Carl Levine, Morgulas & Foreman, of New York City, on the brief), for plaintiff-appellant. Sidney J. Kaplan, Sp. Asst. to the Atty. Gen., of Washington, D. C. (Harold M. Kennedy, U. S. Atty., Eastern Dist. of N. Y., and Francis M. Shea, Asst. Atty. Gen., and Maurice W. Hibschman, Atty., Dept. of Justice, both of Washington, D. C., and Vine H. Smith, Asst. U. S. Atty., Eastern Dist. of N. Y., on the brief), for the United States.

CLARK, Circuit Judge.

This is an action by Jacob Sherwood, as judgment-creditor of Frederick Kaiser, brought against the United States of America and Kaiser, to recover damages claimed to be due Kaiser upon the latter's contract with the United States for the construction of a post office. Suit is brought in the district court upon the theory that the claim was one properly cognizable under the Tucker Act, 28 U. S. C. A. §§ 41 (20) and 250, by which the United States consents to be sued in certain cases, in either the district court or the court of claims.[1] Sherwood and Kaiser are both residents

[1] The original Tucker Act, Mar. 3, 1887, c. 359, 24 Stat. 505, which extended jurisdiction to the district courts previously limited to the court of claims, was in form repealed, but in effect restated in the Judicial Code of 1911, §§ 24 (20), 145, 297, 36 Stat. 1093, 1136, 1168.

of the State of New York. Sherwood obtained his judgment against Kaiser in the New York Supreme Court, and pursuant to New York Civil Practice Act, § 795, he procured an order from that court permitting him to bring an action against the United States as a debtor of Kaiser, his judgment-debtor. Purporting to act under the New York order, he then brought the present action, wherein he joined Kaiser as a party defendant, as the New York statute provides.[2] The motion of the United States to dismiss the complaint was granted and plaintiff appeals.

When this action was brought there was pending in the court below an action brought by the United States against Kaiser and the surety on his bond to recover damages for nonperformance of this same construction contract. The parties herein stipulated for the consolidation of this action with the earlier one and an order of consolidation was entered. Then the Government, though it had sought the consolidation, came to doubt the validity of that step and obtained a vacation of this action. Appellant did object to the vacating of the consolidation order, but does not press his objection here, being apparently quite content to keep his claim separate from the claim of the United States against Kaiser. But if we are correct in the views we set forth hereinafter, consolidation was a matter well within the discretion of the court. We shall refer to it because of the obvious procedural economy of judicial action it here presents. Unless we are prevented by some positive rule of law which embodies an overriding public policy, we think it in the public interest that these conflicting claims arising out of a single matter—Kaiser's performance or nonperformance of his contract with the United States—should be settled in one action. That is the trend of modern procedural reform, as exemplified by the new federal rules of civil procedure, in the development of which high officials of the appellee itself assumed such effective leadership.

Indeed, if the new rules are applicable, they justify the procedure which the court below originally followed. They furnish

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[2] N. Y. C. P. A. § 795 is as follows: "Action by judgment-creditor against third party. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment-debtor, the court may make an order authorizing the judgment-creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements, and expenses allowed by the court. Such action by a judgment-creditor against the debtor of the judgment-debtor shall make the judgment-debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment-creditor and against the debtor of the judgment-debtor, and the debtor of the judgment-debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment-debtor."

a reply to appellee's first contention that New York Civil Practice Act, § 795, ex proprio vigore, cannot confer any power to sue in the federal courts. We think Rule 17 (b) is against this contention. That rule states that "the capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile." Compare Bicknell v. Lloyd-Smith, 2 Cir., 109 F. 2d 527. Nothing in the law of the State of New York limits the capacity to sue conferred by Section 795 to a capacity to bring actions in the state courts alone.

It is argued that the new rules do not apply to Tucker Act cases brought in the district court. The intent that they should apply is made manifest throughout the rules. Rules 1 and 81 carefully provide that they shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the proceedings which it was thought necessary to except by express statement in Rule 81, as well as the language of these rules, shows that the new "civil action" includes actions against the United States. Careful protection of the rights of the United States as a party are made in various provisions, such as those giving the United States 60 days to plead, instead of the 20 days allowed the ordinary litigant, Rule 12 (a); and see also Rules 4 (d) (4), 13 (d), 25 (d), 37 (f), 39 (c), 45 (c), 54 (d), 55 (e), 62 (e), and 65 (c). The official notes of the Advisory Committee show the Committee's view that while certain of the procedural provisions of the Tucker Act were continued intact others were modified by the rules.[3] See also 1 Moore's Federal Practice 248–250.

We are cited to the high authority of Lynn v. United States, 5 Cir., 110 F. 2d 586, as holding otherwise; and the court there seems prepared to go to the length of holding the rules wholly inapplicable to Tucker Act cases, although it is not clear that so broad a ruling was required in the case there presented. With all deference we cannot go so far; and we think the statute, 28 U. S. C. A., § 761, which was the court's authority for its view, persuades to the contrary. Only five sections of the statutes deal directly with procedure in Tucker Act cases. 28 U. S. C. A., §§ 761–765, Act of Mar. 3, 1887, §§ 4–7, 10, 24 Stat. 506, 507. Of these, 28 U. S. C. A., § 761, states that "The course of procedure for the district courts and the court of claims in cases under section 41, paragraph 20, and section 250 of this title, insofar as applicable and not inconsistent with sections 762 to 765, and the procedure prescribed for the court of claims shall be in accordance with the established rules of said respective courts, and of such additions

[3] See note 4, below, for the particular rules here involved.

and modifications thereof as said courts may adopt." Sections 762–765 contain no inconsistencies presently relevant.[4] It has been held that so far as the rules modify these sections the rules prevail, United States v. American Surety Co., D. C. E. D. N. Y., 25 F. Supp. 700, but that question is not before us. If the new district court procedure does not apply under Section 761, we may well ask what procedure the district courts are to follow in adjudicating on claims against the United States. In Bates Mfg. Co. v. United States, 303 U. S. 567, 571, the Supreme Court pointed out that the Tucker Act was originally passed to relieve the congestion of claims in the court of claims for which the Government was to be justly censured, and to provide "adequate opportunity for expeditious and orderly determination of claims against the Government." To effectuate such a purpose, procedure carefully designed to secure orderly and expeditious settlement for all litigation would appear to be peculiarly apt.

Appellee reinforces its contention that the new rules are inapplicable by pointing out a difference in form of trial between this action and that with which it was originally consolidated. Under 28 U. S. C. A., § 41 (20), trial of Tucker Act claims must be to the court without a jury, and Rule 39 (c) expressly preserves that right. On the other hand, an action brought by the United States for breach of contract may be claimed for jury trial, and the Government's action against Kaiser and his surety has been claimed for such trial by the defendants. But it is a commonplace of the state code action, with its possible numerous and diverse issues, that different forms of trial may be necessary for different issues. Such necessity does not prevent the all-inclusive nature of the action and the procedural gains which result from a settlement of all angles of a dispute in a single adjudication. The new federal rules expressly adopt this practice. Form of trial is determined for each issue, not for the action as a single unit. Rules 38 and 39; James, Trial by Jury and the New Federal Rules of Procedure, 45 Yale L. J. 1022; Pike and Fischer, Pleadings and Jury Rights in the New Federal Procedure, 88 U. of Pa. L. Rev. 645.

Appellee goes further, however, and urges that with respect to claims against the United States the district courts exercise a special jurisdiction concurrent with the court of claims and similarly circumscribed. The Supreme Court cases make clear that this similarity is one of the substance of the rights and privi-

[4] The Committee's notes to Rules 3, 4 (d) (4), 11, 12 (a), 52 (a), 55 (e), and 75 point out that substantially all the provisions of §§ 762–765 are continued—including such requirements as verification of the petition or complaint (Rule 11) and the filing of a written opinion giving the court's findings of facts and conclusions of law, compare Rule 52 (a)—with some slight addition without change of substance of §763 by Rule 4 (d) (4) as to service and notice of suits.

leges of the claimants; there is nothing in them which asserts the necessity of identic procedure. Bates Mfg. Co. v. United States, supra; United States v. Pfitsch, 256 U. S. 547. True, some cases in the court of claims refer to procedural obstacles as though they were jurisdictional. Thus in Waite v. United States, 57 Ct. Cl. 546, that court suggests its lack of jurisdiction to allow an intervening defendant to come into a suit on a claim before it. But a distinction should be made between the grant of power to adjudicate a claim against the United States and the manner or procedure by which that power shall be exercised. The statutory provision here, 28 U. S. C. A. § 41 (20), 24 Stat. 505, allows the district court to hear claims "upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." This is a general grant of power in the circumstances stated, without limitation as to procedure. Indeed, the statute quoted above, 28 U. S. C. A. § 761, contemplates differences in practice in the two courts. Limitations on procedure in the court of claims, therefore, cannot be jurisdictional defects in the district courts. There is no reason why the court of claims may not adopt the new district court procedure at any time. Moreover, Rule 17 (b) here merely restates former federal practice.[5] Whether or not it is made applicable in the court of claims, it appears to be a procedural rule not going to the district court's jurisdiction.

The same considerations answer appellee's contention that, since Kaiser should be joined as a defendant under New York Civil Practice Act, § 795, suit against it cannot be brought under the doctrine of Waite v. United States, supra. But whatever the practice as to joinder may be in the court of claims, we cannot view it as a question of primary jurisdiction of the district court. The provision of the New York statute is obviously for the protection of the judgment-debtor with reference to the balance above the amount of the judgment-creditor's claim and for the protection of the third-party debtor, assuring him that the matter in issue will become res judicata after judgment is entered. Joinder for the latter purpose is, of course, for the benefit of the appellee. So far as the judgment-debtor has any separate controversy with the plaintiff, the court's power to adjudicate separate issues in one

[5] Rule 17 (b) did change the controlling law from that of the state where the district court was being held to that of the domicile—a change of no importance here in view of Sherwood's New York domicile. Advisory Committee's notes to Rule 17 (b); 2 Moore's Federal Practice 2084, 2085. Compare also Rule 17 (a) for suit in the name of the real party in interest, with its provision that "a party authorized by statute may sue in his own name." 2 Moore's Federal Practice 2074; Clark, Code Pleading, 124.

action and to order separate trials if desirable [Rule 42 (b)] is adequate to prevent injustice or even inconvenience to the Government. The alignment of parties to a civil action now is not a matter of fundamental importance; under Rule 19 (a) a person can even be made an involuntary plaintiff. We see no reason why Kaiser cannot be a defendant in the present action without destroying jurisdiction.

Appellee further contends that Rule 17 (b) is inapplicable in the face of R. S. § 3477, 31 U. S. C. A. § 203, prohibiting assignment of a claim against the United States before the claim is allowed. As we read New York Civil Practice Act, § 795, it does not bring about an assignment or transfer of title of the debt to the judgment-creditor, but merely confers upon him a power to bring an action. This conclusion seems to be supported by a consideration of the background and history of the legislation; we shall have occasion to note below that it was passed to supplement existing statutes providing on the one hand for levy on wages, debts, and like claims, and on the other for enforcement of such claims through receivership proceedings.[6] But even if Section 795 does provide for an actual assignment of the claim, nevertheless it is then an assignment by operation of law. The assignor has had no part in it; the act is wholly in invitum so far as he is concerned. R. S. § 3477, 31 U. S. C. A. § 203, applies only to voluntary assignments, and not to all of those (Goodman v. Niblack, 102 U. S. 556); it does not reach assignments by operation of law. Brooks v. Mandel-Witte Co., 2 Cir., 54 F. 2d 992; Western Pac. R. R. v. United States, 268 U. S. 271. The purpose of R. S. § 3477 is to protect the Government from traffic in claims against it, and no trafficking can result from a court order appointing the judgment-creditor as the person entitled to bring suit, and enjoining the judgment-debtor from interfering therewith. The judgment-creditor then becomes the real party in interest under Rule 17 (a) and as such is the proper party plaintiff. Rosenblum v. Dingfelder, 2 Cir., 111 F. 2d —.

Appellee complains that the New York judgment was not sufficiently alleged in the plaintiff's complaint. A general alle-

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[6] From the time of David Dudley Field and the original New York Code of Civil Procedure to the present, the procedure to effect execution of a judgment has been considered inadequate, and steps have been advocated and taken to provide better remedies for judgment-creditors. The matter was studied by the New York Commission on the Administration of Justice and by the New York Judicial Council, and on recommendation of the latter, new remedies were provided by the legislature in 1935, of which the statute here in issue was one. This history is recounted in I. H. Cohen, Collection of Money Judgments in New York, 35 Col. L. Rev. 1007, 1196, 36 Col. L. Rev. 1061. See also Comment, 48 Yale L. J. 1377. Federal Rule 69 (a) expressly provides that the procedure on execution in the federal courts, "in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution," shall be in accordance with state practice and procedure.

gation of a court judgment is authorized by Rule 9 (e), and the form of allegation contained in this complaint appears to be quite adequate under that rule. In any event, the rules provide means for securing detailed information [Rules 12 (e), 26 et seq.]; and it is clear from the papers in the record that defendant had sufficient information as to the court's order to enable it properly to prepare its defens .

It is also vigorously asserted that the effect of the New York statute is to provide for garnishment, and that the United States cannot be subjected to garnishment. This contention presents questions as to both the aptness and the adequacy of the suggested analogy. Since the Supreme Court in Buchanan v. Alexander, 4 How. 20, in 1846, vacated an "attachment" of moneys due seamen on a war vessel because national funds specifically appropriated for one purpose could not be otherwise used, it seems to have been generally believed that garnishment would not lie against the United States. But as pointed out in Federal Housing Administration v. Burr, 309 U. S. —, 60 S. Ct. 488, the reason for the Buchanan decision was that the United States could not then be sued. As Justice Douglas says, garnishment is simply a form of suit, and when consent to sue is granted, that consent would normally include the process of garnishment, unless there are exceptional circumstances to show its exclusion. Hence the Court in the Burr case held that a Congressional grant of consent to sue the Federal Housing Administration subjected it to garnishment process.[7] It would follow, therefore, that, where the United States has consented to be sued, without limitation on the manner thereof, suit by garnishment is included in such consent, unless other statutes show a policy to the contrary or provide restrictions on the remedy. In the light of the Burr case the question whether garnishment or like process may be brought on a Tucker Act claim must be reëxamined.

We do not propose such a general reëxamination at this time, for the statutes providing for what is generally termed inclusively "garnishment" are of such varying form as to make abstract propositions of little value. We have seen that there are various statutes limiting the enforcement of Tucker Act claims, such as the one restricting assignments which we have discussed above. How far those laws may apply to a particular state statute of "garnishment" must be considered as each case is presented. We have already indicated our view that no federal statutes prevent the

[7] The court held, however, that such consent did not of itself go so far as to justify execution against funds in the United States Treasury, even though the judgment might thus be rendered ineffective for lack of an appropriation to satisfy it. Compare discussion of the Burr case in the majority and dissenting opinions in Reconstruction Finance Corp. v. J. G. Menihan Corp., 2 Cir., 111 F. 2d. —. And see also United States v. Winkle Terra Cotta, Inc., 8 Cir., 110 F. 2d 919.

application of New York Civil Practice Act, § 795, in this case. We may add that, while, of course, Section 795 has a similarity to what we ordinarily think of as garnishment—it attempts to secure for a creditor a claim due to the debtor from a third person—it does not seem to be so considered in the New York statutory scheme. Garnishment is more properly the process, authorized as early at least as 1843, now appearing in New York Civil Practice Act, § 684, for "levy upon earnings or income of a judgment-debtor." This process is limited in various ways in the manner and form of its enforcement and can only be had "where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment-debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week." It was but natural that a new remedy not thus restricted, and enforceable by direct action by the creditor against the third-party debtor, should be thought desirable.[8]

This new remedy of Section 795 seems in many ways more like a proceeding by a receiver in supplementary proceedings authorized under New York Civil Practice Act, §§ 804–810, than like a garnishment action under § 684. Such a receiver could maintain the present action without doubt, even though he, too, in substance is but an instrument for reaching a claim owed to the judgment-debtor. Erwin v. United States, 97 U. S. 392; Goodman v. Niblack, supra; Price v. Forrest, 173 U. S. 410; Western Pac. R. R. v. United States, supra.

A receiver in supplementary proceedings, appointed under §§ 804–810 of the Civil Practice Act, could maintain the present action despite the cry of garnishment. Yet such a receiver is merely an agent of the judgment-creditor. There is no reason to deny a similar power to the judgment-creditor himself when, with the permission of the court, he invokes the short cut authorized by Section 795. His position seems fairly analogous to that of a receiver, acting under the control of the court signing the order.

A final question, whether the United States is a person or corporation indebted to the judgment-debtor within the language of New York Civil Practice Act, § 795, was not briefed or argued, but seems to us of such decisive importance as to deserve our attention here. Nothing in the entire chapter on supplementary proceedings (N. Y. C. P. A., §§ 773–810) indicates whether or not the word "person" includes the State of New York or the United States. "Person" has received varying interpretations in varying

[8] See articles cited, note 6, above.

statutory contexts. Section 37 of the N. Y. General Construction Law defines "person" so as to exclude the sovereign except in one case not now relevant, and it has been held that this exception indicates that "person" does not include the state in any other connection. Saranac L. & T. Co. v. Roberts, 195 N. Y. 303, 323; see Onondaga County Sav. Bank v. Love, 166 Misc. 697, 3 N. Y. S. 2d 428. In Curtis, Statutes and Statutory Construction, 1 McKinney's Consolidated Laws of New York, § 65, we are told that the word "person" is not to be construed as including the sovereign, citing Matter of Fox, 52 N. Y. 530. The Fox case was affirmed by the United States Supreme Court, and the point at issue reiterated, in 94 U. S. 315. And see Davis v. Pringle, 268 U. S. 315.

On the other hand, the Court of Appeals has ruled that a foreign nation is a "person" within the statute requiring nonresident persons to provide security for costs in litigation. Republic of Honduras v. Soto, 112 N. Y. 310. This holding was recently reiterated in Ohio ex rel. Fulton v. Saal, 239 App. Div. 420, 267 N. Y. S. 558, appeal dismissed on other grounds, 264 N. Y. 465, in an opinion discussing the definition of "person" in § 37 of the General Construction Law and refusing to apply it. And in Nardone v. United States, 302 U. S. 379, 383, the word "person" in the Federal Communications Act was held to include both the Government and its agents, over a vigorous dissent by Mr. Justice Sutherland on that very issue. See also Stanley v. Schwalby, 147 U. S. 508, 517.

Despite the General Construction Law, the meaning of the word in each case appears to depend upon the legislature's intent under the circumstances. Matter of Bronson, 150 N. Y. 1, 5. In cases like the present, where speculation over actual intent is futile, we can rely only on our estimate of whether or not the injuries done to the sovereign by including it within the purview of the statute are so great that the legislature can be presumed not to have intended them.

If the state has been made susceptible to all third-party orders in supplementary proceedings, it may, of course, be subject to considerable inconvenience. But there is reason to believe that the legislature might think such embarrassment to be outweighed by the increased efficiency in execution which might thus be achieved. The State of New York permits itself to be garnisheed. New York Civil Practice Act, § 684 (8). The state may also be examined before trial in suits brought against it in the New York Court of Claims. N. Y. Court of Claims Act, § 17. And in at least three third-party actions brought under the new supplementary proceedings chapter, the State of New York has appeared and failed

to object that it was not a "person or corporation indebted to the judgment-debtor." Brearton v. Morgan, 257 App. Div. 34; Hollywood Garage Corp. v. Pettis & Co., Inc., 169 Misc. 906; Heilman v. St. Cloud, 164 Misc. 154.

We regret the necessity of defining the meaning of "person" in Section 795 before any New York court has had an opportunity to do so. Cf. Sammet v. Mayer, 2 Cir., 108 F. 2d 337. But we cannot avoid that responsibility, for the debtor of the judgment-debtor is entitled to attack the validity of the order authorizing supplementary proceedings against him. Nankivel v. Omsk All Russian Government, 237 N. Y. 150, 158. With some hesitation we rule that the sovereign is included within the word "person" in Section 795.

If the legislature intended to include the state as a person in Section 795, it would seem to follow that the United States is likewise so included. The United States, of course, cannot be sued without its consent. But we have already ruled that by the Tucker Act and Rule 17 (b), consent is given to a suit brought by a judgment-creditor of the person holding a claim against the United States, who has been authorized by state law to conduct the action.

In summary, therefore, we see procedural advantages in the course first followed below and do not find it prohibited. Though the issue of consolidation of the two actions was not pressed before us, yet the power to consolidate is given the court whenever "actions involving a common question of law or fact" are pending before it. Rule 42 (a). This would seem a most appropriate case for the exercise of that power. It is not prevented, as urged below, by R. S. § 951, 28 U. S. C. A. § 774, restricting the use of counterclaims against the United States not previously presented to the accounting officers of the Treasury. This claim upon the part of Sherwood, independently asserted in this action, is not a claim which the defendant in the other action has against the opposing party at the time of filing his answer. Rule 13 (a) and (b).

Reversed.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of July one thousand nine hundred and forty.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

JACOB L. SHERWOOD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, *Clerk.*

Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed July 12, 1940. D. E. Roberts, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 49, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Jacob L. Sherwood, Plaintiff-Appellant, against United States of America, Defendant-Appellee, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of July, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

[SEAL] D. E. ROBERTS, *Clerk.*

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33-51 Supreme Court of the United States

Order allowing certiorari

Filed November 18, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File No. 44849. U. S. Circuit Court of Appeals, Second Circuit. Term No. 500. The United States of America, petitioner, vs. Jacob L. Sherwood. Petition for a writ of certiorari and exhibit thereto. Filed October 11, 1940. Term No. 500 O. T. 1940.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

JACOB L. SHERWOOD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals entered in the above case on July 12, 1940.

OPINIONS BELOW

The order of the United States District Court for the Eastern District of New York (R. 31) was entered without an opinion. The opinion of the Circuit Court of Appeals (R. 33–42) is reported in 112 F. (2d) 587.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 12, 1940 (R. 42–43). The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a creditor on a judgment obtained in a New York state court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of the judgment debtor against the United States.

2. Whether the maintenance of such an action is prohibited by Revised Statutes 3477 governing the transfer of claims against the United States.

3. Whether the District Court has jurisdiction under the Tucker Act where the judgment debtor is joined as party defendant.

4. Whether the jurisdiction of the district courts under the Tucker Act has been enlarged by the Federal Rules of Civil Procedure.[1]

STATUTES AND RULES INVOLVED

The applicable portions of the statutes and rules involved are set forth in the Appendix, *infra,* pp. 16–18.

STATEMENT

On April 1, 1939, respondent Sherwood brought suit against the United States under the Tucker

[1] If this petition is granted, the Government will also argue the question whether the United States is a "person" within the meaning of Section 795 of the New York Civil Practice Act.

Act[2] in the United States District Court for the Eastern District of New York, alleging that one Kaiser had entered into a contract with the United States, and that the United States had breached the contract. The complaint alleged that pursuant to Section 795 of the New York Civil Practice Act suit was brought pursuant to an order of the Supreme Court of New York, Queens County, which order had duly authorized and empowered the respondent to maintain the action as a judgment creditor of Frederick M. Kaiser who had a claim against the United States for breach of contract.[3]

Three causes of action, amounting respectively to $10,000, $3,085.45, and $1,360.00, were set forth in the complaint, and judgment in the amount of $10,000 was sought (R. 23–30). Pursuant to the

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[2] Sections 24 (20) and 145 of the Judicial Code.

[3] Kaiser entered into a contract with the United States on January 27, 1933, for the construction of a post office at East Greenwich, Rhode Island (R. 6). On September 25, 1933, the United States, being dissatisfied with the progress then being made, notified Kaiser and his surety that the right to proceed was terminated (R. 7). The right to proceed was restored on October 28, 1933, at the surety's request (R. 7), and Kaiser was authorized to proceed on December 16, 1933 (R. 9). Kaiser, however, failed to perform any work subsequently, and on January 26, 1934, Kaiser and his surety were again notified of the termination of Kaiser's right to proceed (R. 9). The surety notified the Government on April 4, 1934, that it did not elect to complete the work (R. 9). Pursuant to an invitation to bid, the contract to complete the work was awarded to another concern, and the work was completed on August 2, 1935. The loss incurred by the Government was $15,861.85 (R. 9).

New York statute, Kaiser was named defendant in the action (R. 23–28).[4]

Prior to institution of the instant suit the United States on January 17, 1939, had brought an action against Kaiser and his surety, the Fidelity & Deposit Company of Maryland, in which the United States asked judgment in the sum of $15,861.85 as a result of Kaiser's failure to perform his contract (R. 10). Both Kaiser and his surety appeared, answered, and demanded a jury trial (R. 10).

By agreement of counsel, the two actions were consolidated (R. 15). Thereafter, counsel for the Government concluded the consolidation was improper (R. 16), and moved to vacate the order of consolidation, and to dismiss the complaint of Sherwood (R. 4, 5). The order of consolidation was vacated (R. 31), and the motion to dismiss the complaint was granted (R. 3–4). On appeal from the order of dismissal, the Circuit Court of Appeals for the Second Circuit reversed. The court held that, under Rule 17 (b) of the Federal Rules of Civil Procedure, the respondent's "capacity to sue" was governed by the law of his domicile, and that Section 795 of the New York Civil Practice Act conferred authority for the maintenance of an

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[4] On January 20, 1939, Sherwood brought an action against the United States for $10,000, alleging an assignment of Kaiser's claim against the United States for breach of contract (R. 10). On March 30, 1939, that action was dismissed on the ground that it was in contravention of Section 3477 of the Revised Statutes (R. 10, 15).

action in the federal courts on the claim of the judgment debtor. The court further held that the maintenance of the action was not prohibited by Revised Statutes 3477 restricting the transfer of claims against the Government.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that a creditor on a judgment obtained in a New York state court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of his judgment debtor against the United States.

2. In holding that the Federal Rules of Civil Procedure are in all respects applicable to Tucker Act cases.

3. In construing Rule 17 (b) of the Federal Rules of Civil Procedure as referring to the right to maintain an action under Section 795 of the New York Civil Practice Act.

4. In holding that Rule 17 (b) of the Federal Rules of Civil Procedure, as so construed, authorizes the maintenance of this action against the United States under the Tucker Act.

5. In holding that the joinder of respondent's judgment debtor as a codefendant with the United States did not deprive the District Court of jurisdiction under the Tucker Act.

6. In holding that the grant of authority to maintain this action under Section 795 of the New York Civil Practice Act did not violate Revised Statutes 3477.

7. In holding that the United States is a "person" within the meaning of Section 795 of the New York Civil Practice Act.

8. In holding that the suit of the United States against Kaiser and his surety should be consolidated with the instant action under the Tucker Act.

9. In reversing the judgment of the District Court of the United States for the Eastern District of New York.

REASONS FOR GRANTING THE WRIT

The specific questions presented in this case are whether, consistently with Revised Statutes 3477, a state court may authorize a creditor to sue the United States on the claim of its debtor, and whether a district court sitting as a court of claims has jurisdiction to entertain such an action under the Tucker Act and the Federal Rules of Civil Procedure. The basic issue, however, is whether garnishment or other third-party actions may be maintained against the United States. This Court has recently held that government corporations which are subject to suit generally are subject to garnishment. *Federal Housing Administration* v. *Burr*, 309 U. S. 242. In extending the doctrine of the *Burr* case to third-party proceedings against

the United States under the Tucker Act, the court below has decided a question of far-reaching importance which should be settled by an authoritative decision of this Court.

1. In holding that this action may be maintained consistently with Revised Statutes 3477, the court below has announced a novel and important exception to the statute and ignored the policy of the statute and the principles established by this Court in its construction.

Revised Statutes 3477 declares that any transfer or assignment of a claim against the United States or any power of attorney to receive payment of such claim shall be null and void unless made after the allowance of the claim, the ascertainment of the amount due, and the issuance of a warrant for payment. Admittedly, the claim of the respondent's judgment debtor has never been ascertained or allowed; on the contrary, the contract on which that claim is based is the subject matter of a separate suit by the United States against the judgment debtor for breach.

The suggestion of the court below that Section 795 of the New York Civil Practice Act does not bring about a transfer or assignment of the claim (R. 38) is beside the mark, since Revised Statutes 3477 expressly prohibits powers of attorney as well as assignment or transfer. And in holding that the assignment, if any, is one by operation of law and hence not prohibited by the statute, the court

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below misapplied the decisions of this Court. The purpose of the statute, as this Court has held, is to protect the Government against the danger of "becoming embroiled in conflicting claims, with delay and embarrassment" and against being "harassed by multiplying the number of persons with whom it had to deal." *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Hobbs* v. *McLean*, 117 U. S. 567, 576. Where all the claimant's property is transferred by operation of law to the claimant's legal successor, whether by descent (cf. *Erwin* v. *United States*, 97 U. S. 392, 397), corporate reorganization (*Seaboard Air Line Ry.* v. *United States*, 256 U. S. 655), purchase at a judicial sale (*Western Pac. R. R. Co.* v. *United States*, 268 U. S. 271), or some other change in the claimant's legal status, the Government is not embarrassed by the assignment, and Revised Statutes 3477 is, therefore, inapplicable. For the same reason, a purely voluntary assignment of all of the claimant's assets for the benefit of creditors is not within the purview of the statute. *Goodman* v. *Niblack*, 102 U. S. 556. In all of such cases, the number of persons with whom the Government must deal is not changed, the Government is not embarrassed in the administration of its business, the availability to the Government of counterclaims is in no way interfered with, nor is the ability of the Government to compromise or settle mutual claims impaired.

There is nothing in these decisions to suggest that a creditor may be permitted by court order to sue on an individual claim of his debtor to the extent of the creditor's interest. The creditor in such case is not a general representative with respect to all of the claimant's assets, and his interest and that of the claimant may therefore conflict. The claimant might be willing to release or reduce its claim against the Government in exchange for a reduction in the Government's demand. The creditor, however, has no interest in effecting such a settlement. The effect of authorizing him to sue to the extent of his interest would thus be not only to multiply the number of persons with whom the Government must deal, but to embarrass the conduct of its business.

Such actions should not be excepted from the operation of Revised Statutes 3477 in the absence of an authoritative decision of this Court. There is no such decision. The case of *Price* v. *Forrest,* 173 U. S. 410, relied on by respondent in the court below, is not in point. In that case, as in *Houston* v. *Ormes,* 252 U. S. 469, the claim had been ascertained and allowed, and the Government was merely in the position of a stakeholder, the duty of the government officer to pay being ministerial only and enforceable by mandamus.

2. The decision of the court below that the action is not precluded by Revised Statutes 3477 is in direct conflict with the decision of the Court of

Claims in *Howes & Co.* v. *United States,* 24 C. Cls. 170. In that case the Court of Claims held that an order of a state court, made pursuant to a local statute, appointing a receiver to prosecute an individual claim against the United States was invalid under Revised Statutes 3477. The court concluded that "Should the practice of making such attachments become common, as it no doubt would if sustained," the Government would become "involved in controversies between such claimants and their creditors" and "the business and responsibilities of the accounting officers would be largely extended and the liability of frauds upon the Treasury by errors and otherwise would be greatly increased." *Id.* at 184.

3. In holding that the action was within the jurisdiction of the district courts sitting as a court of claims notwithstanding the joinder of the judgment debtor as a party defendant, the decision of the court below is in conflict with several decisions of the Court of Claims.

Section 795 of the New York Civil Practice Act requires that the debtor be made a party defendant and provides for the disposition, by the judgment in the authorized action, of any amount recovered in that action in excess of that required to pay the creditor's judgment costs or expenses allowed by the court. The court below expressly recognized that, in addition to the controversy between the claimant and the United States, the case involves a separate controversy between the

claimant and the creditor (R. 37–38, 42). Cf. *Howe & Co.* v. *United States,* 24 C. Cls. 170, 184–185. It held, however, that the district court had jurisdiction to "adjudicate separate issues" in which the United States is not directly interested (R. 37–38). This decision, as the court itself observed, is in conflict with the decisions of the Court of Claims holding that the jurisdiction conferred by the Tucker Act is limited to claims against the United States, and does not confer authority to adjudicate controversies between private persons, and that such persons, therefore, cannot be made parties defendant in the Court of Claims. *Jackson* v. *United States,* 27 C. Cls. 74, 84–85; *Waite* v. *United States,* 57 C. Cls. 546; *Leather and Leigh* v. *United States,* 61 C. Cls. 388, 390. These decisions of the Court of Claims cannot be distinguished on the ground that this action was brought in the district court. So far as concerns any separate controversy between the creditor and the claimant, the district court lacked any jurisdiction, there being neither diversity of citizenship nor a federal question. Under the Tucker Act, the jurisdiction of the district court sitting as a court of claims is as limited as that of the Court of Claims, and carries with it no ancillary jurisdiction to determine controversies between private parties.

4. The decision of the court below that, under Rule 17 (b) of the Federal Rules of Civil Pro-

cedure, state law is determinative of the right to sue, is in conflict with settled principles and with the considered language of the Circuit Court of Appeals for the Fifth Circuit in *Lynn* v. *United States,* 110 F. (2d) 586. In essence, the court below held that the Rules constitute an enlargement of the jurisdiction of the district courts under the Tucker Act. It is a matter of considerable importance to the Government to know what impact, if any, the Rules have upon the Tucker Act, particularly when the views expressed in another circuit run contrary to the holding below.

Rule 17 (b) provides that "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile." This rule seems plainly inapplicable in the instant case. Contrary to the conclusion of the court below (R. 37), the question involved is one of jurisdiction, and not of the manner of its exercise. The respondent's personal capacity to sue and be sued is not in controversy. There is no suggestion that respondent is without capacity to sue by reason of infancy, insanity, alienage, coverture or any other disqualification to which Rule 17 (b) is intended to apply. The question is whether the Tucker Act confers jurisdiction on the district courts to entertain an action involving separate issues between third parties in which the United States has no interest. On this

issue the law of New York is not controlling. The states are without power to regulate the jurisdiction of the federal courts. *Monra* v. *United States,* 303 U. S. 36, 41; *Penn Co.* v. *Pennsylvania,* 294 U. S. 189, 197. Rule 17 (b) does not enlarge the power of the states in this respect. The Federal Rules of Civil Procedure relate to matters of procedure alone, and do not extend or limit the jurisdiction or venue of the district courts in any manner (Rule 82). Certainly, the Rules were not intended to subject the United States to suit in any court at the will of the states. It is, therefore, difficult to understand the conclusion of the court below that consent to sue is conferred by the Tucker Act "and Rule 17 (b)" (R. 42).

The decision is in conflict with the considered views of the Circuit Court of Appeals for the Fifth Circuit in *Lynn* v. *United States, supra.* In that case an action was brought against the United States under the Tucker Act and against the Tennessee Valley Authority under the Act of its creation, authorizing it to sue and be sued in any court of competent jurisdiction. The actions were sought to be joined under Rule 20. The Circuit Court of Appeals held that an action under the Tucker Act is neither an action at law nor a suit in equity and that the Federal Rules of Civil Procedure were, therefore, inapplicable. *Id.* at 588–589. While it is unnecessary to go so far in order

to hold that the Rules do not enlarge the Government's amenability to suit, the opinion in the *Lynn* case sufficiently indicates that the question of the extent of the application of the Rules to Tucker Act proceedings is one of importance which should be settled by this Court.

5. In holding that Congress consented to suits of this character by granting jurisdiction to determine claims against the United States, the court below relied on *Federal Housing Administration* v. *Burr*, 309 U. S. 242. In that case this Court held that the Administration was subject to garnishment under Section 1 of the National Housing Act authorizing the Administrator "to sue and be sued in any court of competent jurisdiction, State or Federal". Although the decision would seem to be limited to cases "where federal governmental corporations are concerned" (*id.* at 245), the court below concluded that "In the light of the *Burr* case the question whether garnishment or like process may be brought on a Tucker Act claim must be reexamined" (R. 39). The opinion below, it is true, disclaims any intention of making such a "general reexamination" (R. 39), but it is difficult to distinguish the present action from any other third-party proceeding involving separate issues between private parties. The question whether the *Burr* case should be extended to Tucker Act proceedings is thus squarely presented and seems

plainly of such importance as to require an authoritative decision of this Court.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

APPENDIX

Section 24 (20) of the Judicial Code, 28 U. S. C. 41 (20) provides in part:

> Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Section 3477 of the Revised Statutes, 31 U. S. C. 203, provides in part:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall

be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. * * *

Section 795 of the New York Civil Practice Act provides:

Action by judgment-creditor against third party. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment-debtor, the court may make an order authorizing the judgment creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment,

costs, disbursements and expenses allowed by the court. Such action by a judgment creditor against the debtor of the judgment debtor shall make the judgment debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment creditor and against the debtor of the judgment debtor, and the debtor of the judgment-debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment debtor.

Rule 17 (b) of the Federal Rules of Civil Procedure provides:

Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 500

THE UNITED STATES OF AMERICA, PETITIONER

v.

JACOB L. SHERWOOD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of New York (R. 20) is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 21–30) is reported in 112 F. (2d) 587.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit (R. 31) was entered on July 12, 1940. The petition for a writ of certiorari was filed on October 11, 1940 and was

granted November 18, 1940. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a creditor on a judgment obtained in a New York court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of the judgment debtor against the United States.

2. Whether the District Court has jurisdiction under the Tucker Act where the judgment debtor is joined as party defendant.

3. Whether the jurisdiction of the District Courts under the Tucker Act has been enlarged by the Federal Rules of Civil Procedure.

4. Whether the maintenance of this action is prohibited by R. S. § 3477 governing the transfer of claims against the United States.

5. Whether the United States is a "person or corporation * * * indebted to the judgment-debtor" within the meaning of Section 795 of the New York Civil Practice Act.

STATUTES AND RULES INVOLVED

The applicable portions of the statutes and Rules involved are set forth in the Appendix, *infra*, pp. 56–62.

STATEMENT

On April 1, 1939, respondent Sherwood brought suit against the United States under the Tucker Act[1] in the United States District Court for the Eastern District of New York, alleging that one Kaiser, his judgment debtor, had entered into a contract with the United States, and that the United States was liable for breach of the contract. In reliance on Section 795 of the New York Civil Practice Act, the complaint alleged as to each cause of action that suit was brought pursuant to an order of the Supreme Court of New York, Queens County,[2] which order had duly authorized and empowered the respondent to maintain the action "nunc pro tunc as of September 1, 1937" as a judgment creditor of Frederick M. Kaiser.[3] (R. 17, 18, 19.)

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[1] 28 U. S. C. §§ 41 (20), 250, c. 359, 24 Stat. 505.

[2] Although the complaint does not set forth the terms of that order and it is not set forth elsewhere in the record, the affidavit of plaintiff in opposition to dismissal states that a copy of the order was served on the United States Attorney and would be submitted at the argument of the motion (R. 13). Included in the Appendix, *infra*, p. 62, is a copy of the order furnished us by counsel for respondent, and it will not be disputed that it is a true copy of the order alleged in paragraph Eleventh (R. 17), Eighteenth (R. 18), and Twenty-fourth (R. 19) of the complaint. The order is entitled "In the Matter of Supplementary Proceedings: Jacob L. Sherwood, Judgment Creditor, against Frederick M. Kaiser, Judgment Debtor".

[3] Kaiser entered into a contract with the United States on January 27, 1933, for the construction of a post office at East Greenwich, Rhode Island (R. 3). On September 25,

Three causes of action, involving claims aggregating $14,445.45, were set forth in the complaint, and judgment in the amount of $10,000 was sought (R. 15–19). Pursuant to the New York statute, Kaiser was named defendant in the action (R. 15–19).

On January 17, 1939, prior to institution of the present suit, the United States had brought an action against Kaiser and his surety, the Fidelity & Deposit Company of Maryland, in which the United States asked judgment in the sum of $15,861.85 as a result of Kaiser's failure to perform his contract (R. 5–6). Both Kaiser and his surety appeared, answered, and demanded a jury trial (R. 6).[4]

1933, the United States, being dissatisfied with the progress then being made, notified Kaiser and his surety that the right to proceed was terminated (R. 4). The right to proceed was restored on October 28, 1933, at the surety's request (R. 4), and Kaiser was authorized to proceed on December 16, 1933 (R. 5). Kaiser, however, failed to perform any work subsequently, and on January 26, 1934, Kaiser and his surety were again notified of the termination of Kaiser's right to proceed (R. 5). The surety notified the Government on April 4, 1934, that it did not elect to complete the work (R. 5). Pursuant to an invitation to bid, the contract to complete the work was awarded to another concern (R. 5).

[4] On January 20, 1939, three days after institution of suit by the United States against Kaiser and his surety, Sherwood brought an action against the United States for $10,000, alleging an assignment of Kaiser's claim against the United States for breach of contract (R. 6). On March 30, 1939, that action was dismissed on the ground that it was in con-

By agreement of counsel, and order thereon by Judge Byers, dated May 15, 1939, the two actions were consolidated (R. 9–10). Thereafter, counsel for the Government concluded that the consolidation was improper (R. 10) and moved to vacate the order of consolidation as well as to dismiss the complaint of Sherwood (R. 2–3). Each branch of the Government's motion was separately granted (R. 2, 20). No appeal was taken from the order vacating the order of consolidation. On appeal from the order of dismissal, the court below reversed. The court held that, under Rule 17 (b) of the Federal Rules of Civil Procedure, the respondent's "capacity to sue" was governed by the law of his domicile, and that the state court order pursuant to Section 795 of the New York Civil Practice Act conferred authority upon the respondent to maintain the present action. The court further held that the United States is a "person indebted" within the meaning of Section 795 and that therefore the state court could authorize an action against the United States under the Tucker Act; that the

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travention of Section 3477 of the Revised Statutes (R. 9). Thereafter, on April 1, 1939, Sherwood commenced the present action, alleging as before the claim of Kaiser, but no longer pleading the assignment formerly relied on. The order of the state court relied on to authorize the present action was dated February 8, 1939, granted on an affidavit sworn to the previous day, three weeks after commencement of the action by the United States against Kaiser and while Sherwood's first action alleging an assignment was still pending. Appendix, *infra*, p. 62.

maintenance of the action was not prohibited by R. S. § 3477 restricting the transfer of claims against the Government; and that the two actions should be consolidated.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that a creditor on a judgment obtained in a New York court against his debtor may, by virtue of Section 795 of the New York Civil Practice Act, maintain an action against the United States under the Tucker Act for recovery on a claim of his judgment debtor against the United States.

2. In construing and applying the Federal Rules of Civil Procedure so as to affect the jurisdiction of the federal courts in Tucker Act cases.

3. In construing Rule 17 (b) of the Federal Rules of Civil Procedure as referring to the right to maintain an action under Section 795 of the New York Civil Practice Act.

4. In holding that Rule 17 (b) of the Federal Rules of Civil Procedure, as so construed, authorizes the maintenance of this action against the United States under the Tucker Act.

5. In holding that the joinder of respondent's judgment debtor as a codefendant with the United States did not deprive the District Court of jurisdiction under the Tucker Act.

6. In holding that the grant of authority to maintain this action under Section 795 of the New York Civil Practice Act did not violate R. S. § 3477.

7. In holding that the United States is a "person" within the meaning of Section 795 of the New York Civil Practice Act.

8. In reversing the judgment of the District Court of the United States for the Eastern District of New York.

SUMMARY OF ARGUMENT

I

1. The jurisdiction of the district courts under the Tucker Act is limited to claims "against the United States". The district courts sitting as courts of claims have no jurisdiction of actions between private persons to which the United States is not a party and such actions do not come within the Tucker Act jurisdiction merely because the Government is joined as a defendant in order that the plaintiff may secure execution on a judgment against the private party defendant. Plainly, therefore, Sherwood's original action against Kaiser could not have been maintained in the District Court even though the United States were joined under a local garnishment statute as a means of satisfying any judgment rendered against Kaiser.

The case is not altered because judgment has been rendered against Kaiser by the state court. Fundamental issues remain between the private parties notwithstanding the judgment. Section 795

of the New York Civil Practice Act, pursuant to which Sherwood was authorized by the state court to bring this suit, contemplates the litigation of more than the single issue of liability on the claim of Kaiser against the United States, which alone is within the Tucker Act jurisdiction. It contemplates, in addition, litigation of the question of the validity of the judgment against the judgment debtor. In the absence of a valid judgment and order against him, no judgment can be entered in turn against his debtor. Further, the judgment debtor may raise the issue of the validity of the *ex parte* order authorizing the supplementary proceedings; such an issue was actually adjudicated by the court below in this case. Section 795 also seeks to give the judgment debtor his day in court as to the amount of recovery so as to prevent subsequent action by him or by other creditors of his. Moreover, there is nothing in the New York practice to prevent other judgment creditors from being made parties to the proceedings so as to have all the rights of all parties decided at one time. To hold, as did the court below, that the jurisdiction of the District Courts under the Tucker Act may be invoked in this type of proceeding is to allow use of that Act as a means for the settlement of insolvent estates of claimants against the United States. Such a construction of the Tucker Act is a far cry from the intendment of Congress in enacting it.

Moreover, the proceedings authorized by Section 795 are clearly supplementary in character. It is an established doctrine that even a federal court of "general" jurisdiction will not maintain such an action in aid of enforcement of a state court judgment. In these circumstances, it seems plain that Congress did not intend to authorize the District Courts to maintain such actions under the limited jurisdiction conferred upon them by the Tucker Act.

2. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, furnishes no support for the judgment below. That decision is limited in its application to modern governmental corporations authorized to "sue-and-be-sued" in both state and federal courts of "general" jurisdiction competent to adjudicate issues between private parties. The decision is founded on the modern Congressional policy, reflected in recent enactments, of relaxing governmental immunity in the case of such corporations. It has no application to the construction of the Tucker Act, enacted in 1887, and creating special courts of limited jurisdiction to adjudicate claims against the United States. Any attempt to construe the Tucker Act in the light of modern and unrelated enactments raises a number of difficulties forcibly suggesting that the Act was not intended to extend to third party proceedings.

3. The jurisdiction of the district courts is not enlarged by the provisions of Rule 17 (b) of the

Federal Rules of Civil Procedure. Those Rules, of course, are applicable to Tucker Act proceedings, but they are limited to matters of procedure and do not extend to matters of jurisdiction. Rule 82 expressly so provides.

II

The order of the state court authorizing the present action is null and void under the express provisions of R. S. § 3477, prohibiting all transfers of claims against the United States. One of the purposes of this statute was to protect the Government against multiplication of the persons with whom it must deal and consequent embarrassment in the conduct of the Government's business.

Where, as in this case, the judgment creditor's claim is for less than the full amount of the judgment debtor's claim against the United States, the authorization of supplementary proceedings by the judgment creditor obviously multiplies the number of persons with whom the Government must deal. The evil is by no means theoretical, as the facts of this case show. The United States has filed an independent action against Kaiser for breach of the same contract on which this action is founded. Any attempt to settle or compromise the conflicting claims of the United States and Kaiser are dependent on Sherwood's consent if these proceedings are maintainable.

The situation would not be materially different even if Sherwood's judgment equalled or exceeded the amount of Kaiser's claim against the United

States. In order to avoid the risk of an affirmative judgment against him, Kaiser might be willing to release his claim in exchange for a release or reduction of the Government's claim against him. Sherwood, whose sole interest is in satisfying his judgment, would clearly have no interest in effecting such a settlement. The only risk which Sherwood incurs is that judgment on the Government's claim may defeat any recovery on Kaiser's claim; Sherwood does not share the further risk facing Kaiser of liability on an affirmative judgment in favor of the United States.

The court below held that the transfer of the claim was not within the prohibition of R. S. § 3477 because it was a transfer "by operation of law". Although this Court has held in a number of cases that certain transfers by operation of law are beyond the scope of the statute, analysis of the decisions makes clear that they were based upon the policy of the Act and not the form of the transfers. The decisions plainly indicate that any transfer which conflicts with both the letter and policy of the statute falls within its sphere of operation, whether the transfer be by operation of law or not.

The type of situation to which R. S. § 3477 is inapplicable is that presented where all of the claimants' property has been transferred to his

successor or representative. In such cases, the transferee or legal successor is substituted for the original claimant and is in precisely the same position as the original claimant with respect to the claim against the United States and with respect to any counterclaims which the United States may have. Such a transfer, as distinguished from the type of transfer here involved, in no way multiplies the number of persons with whom the Government must deal and cannot embarrass the conduct of its business. The only cases in which transfers "by operation of law" of claims against the United States have been sustained, apart from a general transfer of all the claimant's assets, are those in which the Government had previously allowed the claim and, at the time of the transfer, was in the position of a mere stakeholder. Such transfers obviously do not embroil the Government in the conflicting claims of private parties.

III

The judgment below should be reversed for the further reason that Section 795 of the New York Civil Practice Act, properly construed, does not authorize an action on a claim against the United States.

ARGUMENT

The present suit was brought under the provisions of the Tucker Act (c. 359, 24 Stat. 505, 28 U. S. C. §§ 41 (20), 250). It is the Government's

position that the District Court was without jurisdiction to entertain the proceeding because the jurisdiction conferred upon the District Court by the Tucker Act is limited to original actions on claims against the United States and does not extend to third party proceedings, original or supplementary, involving issues between private individuals. The Government further contends that maintenance of the present action is precluded by R. S. § 3477, which prohibits the transfer of claims against the United States. And finally, the Government urges that, as a matter of New York law, the respondent was not properly authorized to maintain the action because the statutory provision pursuant to which the proceedings were authorized by the state court (Section 795 of the New York Civil Practice Act) does not apply to claims against the United States.

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION OF THIS ACTION

A. THE ACTION WAS NOT AUTHORIZED BY THE TUCKER ACT

There is nothing in the Tucker Act or in the decisions interpreting it that authorizes the present supplementary proceeding against the United States.

The Tucker Act, *inter alia,* confers on the district courts jurisdiction "concurrent with the Court of Claims, of all claims not exceeding $10,000 * * * upon any contract, express or

implied, with the Government of the United States * * *, in respect to which claims the party would be entitled to redress against the United States * * * if the United States were suable". The Act provides in addition that "All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury." The jurisdiction conferred on the district courts by this Act is "the exceptional jurisdiction concurrent with the Court of Claims where it sits without a jury" (*United States* v. *Pfitsch,* 256 U. S. 547), and is the same in substance as the jurisdiction of the Court of Claims. *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, 571; *United States* v. *Jones,* 131 U. S. 1. The concurrent jurisdiction is "an integrated jurisdictional plan by which the Court of Claims and District Courts could afford equal opportunities for expeditious and fair trials of like claims within the jurisdictional amount of the District Courts." *Bates Mfg. Co.* v. *United States, supra,* at 571.

The Tucker Act must be construed in the light of the constitutional source of the Court of Claims' jurisdiction, namely, the power to provide for the payment of the debts of the United States, not the power derived from Article III to establish inferior courts having jurisdiction of varied cases and controversies. *Williams* v. *United States,* 289 U. S. 553, 569, 573. As pointed out in the *Williams* case, the Court of Claims was originally set up as

an administrative or advisory body to investigate claims against the United States. See Act of February 24, 1855, 10 Stat. 612; Act of March 3, 1863, 12 Stat. 765. Although it was subsequently converted into a legislative court and given jurisdiction over controversies which were susceptible of judicial cognizance,[5] its jurisdiction nevertheless remained confined to the limited function of hearing and determining claims against the United States; over any other types of cases or controversies it was given no jurisdiction whatever. And, as we have pointed out, the jurisdiction of the district courts under the Tucker Act is similarly restricted.[6]

It is manifest, therefore, that the district courts sitting as courts of claims are without jurisdiction of proceedings between private persons to which the United States is not a party. And such proceedings cannot be brought within the Tucker Act jurisdiction merely by garnisheeing a claim of the principal debtor against the United States as a means of satisfying any judgment which might be rendered against such debtor. It is well settled

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[5] Act of May 9, 1866, 14 Stat. 44; Act of March 3, 1887, 24 Stat. 505; Act of March 3, 1911, 36 Stat. 1087.

[6] It is only because the Court of Claims, a legislative court, exercises judicial power, although not derived from Article III, that appellate jurisdiction over its judgments can be conferred on this Court or "*concurrent* jurisdiction * * * conferred on the federal district courts". *Williams* v. *United States*, *supra*, at 565 [emphasis supplied].

that, since the Court of Claims and the district courts under the Tucker Act were established for the sole purpose of awarding money judgments "against the United States" in proper cases, only the Government may be a party defendant. *Lynn* v. *United States,* 110 F. (2d) 586 (C. C. A. 5th); *Stark* v. *United States,* 14 F. (2d) 616, 618 (S. D. Ohio); *Leather & Leigh* v. *United States,* 61 C. Cls. 388; *Waite* v. *United States,* 57 C. Cls. 546; *Jackson* v. *United States,* 27 C. Cls. 74. These decisions can not be distinguished on the ground that this action was brought in the District Court which, unlike the Court of Claims, has a "general" jurisdiction apart from the Tucker Act. So far as concerns any separate controversy between the creditor and the claimant, the District Court lacked any jurisdiction, there being neither diversity of citizenship nor a federal question. Under the Tucker Act, the jurisdiction of the District Court sitting as a court of claims is as limited as that of the Court of Claims, and carries with it no ancillary jurisdiction to determine controversies between private parties.

Plainly, therefore, an action by a creditor against his debtor to recover a money judgment does not become a claim "against the United States" merely by joining with it, for purposes of execution, an ancillary action on a claim of the principal debtor against the United States. The case is not altered because judgment has already been rendered by the

state court. Not only do issues remain which the District Court has no jurisdiction under the Tucker Act to determine, but the supplementary character of the proceedings also indicates that the action is not one within the scope of the Tucker Act.

1. Contrary to respondent's contention, the defendant Kaiser is not merely a formal party. Section 795 of the New York Civil Practice Act, pursuant to which Sherwood was authorized by the state court to bring this suit, contemplates the litigation of more than the single issue of liability on the claim of Kaiser against the United States, which alone is within the Tucker Act jurisdiction. *Nankivel* v. *Omsk All Russian Govt.*, 237 N. Y. 150, 158. It contemplates, in addition, litigation of the question of the validity of the judgment against the judgment debtor (see *Nankivel* v. *Omsk All Russian Govt., supra*), because, in the absence of a valid judgment and order against him, no judgment can be entered in turn against his debtor.[7]

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[7] This, if actions such as this one be permitted against the United States under the Tucker Act, the United States would have added burdens of investigation and defense for its own protection, beyond the normal ones in a Tucker Act case, particularly where the judgment debtor defaulted. For its own protection, the United States would have to investigate and perhaps litigate the questions of validity of service and judgment in the original action, the validity of the supplementary proceedings, the validity of the state court's order under Section 795, and the validity of service on the judgment debtor in the Tucker Act suit. This burden and these foreign issues seem entirely incompatible with the theory of the Tucker Act.

Cf. *Van Seggern Bros.* v. *Antelope County State Bank,* 57 S. D. 415; 232 N. W. 913; *Warthen* v. *Melton,* 132 Ga. 113, 63 S. E. 832. As a matter of fact, the court below actually adjudicated an issue between judgment creditor and judgment debtor, the issue of "the validity of the order authorizing supplementary proceedings against him" (R. 30). Section 795 also seeks to give the judgment debtor his day in court as to the amount of recovery (cf. *Edmondson* v. *Dekalb County,* 51 Ala. 103) so as to prevent subsequent action by him (cf. *Harris* v. *Balk,* 198 U. S. 215; *Ruff* v. *Ruff,* 85 Pa. St. 333; *Tams* v. *Bullitt,* 35 Pa. St. 308; *Cameron* v. *Stollenwerck,* 6 Ala. 704; *Barton* v. *Albright,* 29 Ind. 489; *Groves* v. *Brown,* 11 Mass. 333; *Brown* v. *Dudley,* 33 N. H. 511), or by other creditors of his (cf. *Breading* v. *Siegworth,* 29 Pa. St. 396). Moreover, there is nothing in the New York practice to prevent other judgment creditors from being made parties to the proceedings so as to have all the rights of all parties decided at one time.[8] In other words, the scheme of the practice is to determine how much the third party owes to the judgment debtor and who among his judgment creditors is to share in that amount. To hold, as did the court

[8] Such is the ruling under the similar provision of the California law. See California Code of Civil Procedure, Sections 717–720; *Deering* v. *Richardson-Kimball Co.,* 109 Cal. 73, 41 Pac. 801; *Schino* v. *Cinquini,* 7 Cal. App. 244, 94 Pac. 83; *Miller* v. *Superior Court,* 82 Cal. App. 634, 256 Pac. 431.

below, that the jurisdiction of the district courts under the Tucker Act may be invoked for this purpose is to allow use of that Act as a means for the settlement of insolvent estates of claimants against the United States. Such a construction of the Tucker Act is a far cry from the intendment of Congress in enacting it.

2. Even apart from these considerations, which we deem decisive, the District Court is without jurisdiction under the Tucker Act because of the supplementary character of the procedings authorized by Section 795.

In no sense can the present action be considered as an independent suit. Section 773 of the New York Civil Practice Act (which is part of the same article of the Civil Practice Act as Section 795) provides that "to entitle a judgment creditor to maintain a special proceeding authorized by this article, the judgment must have been rendered in any sum by a court of this state, whether or not of record". And Section 795 itself makes provision for the form of the order or judgment which may be entered in the proceeding which the judgment creditor is authorized to institute. It specifically states, for example, that the order or judgment in that proceeding may "provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements and expenses allowed by the court." It further provides that if the debtor of the judgment debtor does not

dispute the indebtedness, costs are not to be entered against him. It likewise imposes as a mandatory requirement that the judgment creditor make the judgment debtor a party defendant. Certainly, no proceeding in the federal courts in which the New York Civil Practice Act governs the necessary parties defendant and the character of the judgment as to costs and as to any surplus recovery can fairly be characterized as an independent action.

As we show below (*infra*, pp. 34–37), the supplementary character of the proceeding and the fact that it is governed by the provisions of the New York Civil Practice Act would be fatal to the maintenance of such an action against a private person in a federal court of "general" jurisdiction in aid of enforcement of a state court judgment. And certainly it cannot be supposed that Congress intended to authorize such actions under the limited jurisdiction conferred by the Tucker Act. The Act contains no language expressly extending jurisdiction to such proceedings and, in view of the well-settled principle that a statute relaxing governmental immunity should be strictly construed, jurisdiction cannot be founded on implication. *United States* v. *Michel*, 282 U. S. 656; *Price* v. *United States and Osage Indians*, 174 U. S. 373; *Schillinger* v. *United States*, 155 U. S. 163.[9]

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[9] While the rule of strict construction has been relaxed in cases involving the suability of "modern federal governmental corporations" (*Federal Housing Administration* v.

Many restrictions on the jurisdiction of the Court of Claims and of the district courts sitting as courts of claims have been imposed because of the limited purpose for which jurisdiction was conferred upon them by the Tucker Act. The problem is not merely a textual one to be solved by reference to the statutory language. Thus it has been held that notwithstanding the reference to "any contract, express or implied", there is no jurisdiction under the Tucker Act to enforce contracts implied in law. *Alabama* v. *United States*, 282 U. S. 502; *Tempel* v. *United States*, 248 U. S. 121. Likewise, it has been held that the Tucker Act is limited to actions for a sum of money only and that, notwithstanding the reference to "equity" in the Act, the Court of Claims lacks jurisdiction to grant the usual equity decrees. *United States* v. *Jones*, 131 U. S. 1; *United States* v. *Turner*, 47 F. (2d) 86 (C. C. A. 8th); *Leather & Leigh* v. *United States*, 61 C. Cls. 388; *Jackson* v. *United States*, 27 C. Cls. 74.[10]

On like principle, the Tucker Act should be construed in strict conformity with the purpose of Congress to provide a forum for the adjudication

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Burr, 309 U. S. 242, 247), it has never been relaxed as to the suability of the United States itself. Cf. *Shaw* v. *United States*, 309 U. S. 495; *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506.

[10] The equitable jurisdiction of the Court of Claims is limited to reforming contracts sued on when necessary to render a money judgment. *Leather & Leigh* v. *United States*, *supra*.

of claims "against the United States" and should not be extended to proceedings arising out of and incidental to controversies between private persons.

3. *Federal Housing Administration* v. *Burr*, 309 U. S. 242, upon which the court below relied, is not opposed to our position. In that case this Court held that the Federal Housing Administration was subject to garnishment under Section 1 of the National Housing Act, as amended, authorizing the Administrator "to sue and be sued in any court of competent jurisdiction, State or Federal." Although the decision would seem to be limited to cases "where federal governmental corporations are concerned" (*id.* at 245), the court below concluded that "In the light of the *Burr* case the question whether garnishment or like process may be brought on a Tucker Act claim must be reexamined." (R. 27.) The opinion below, it is true, disclaims any intention of making such a "general reexamination" (R. 27), but it is difficult to distinguish the present action from any other third-party proceedings involving separate issues between private parties.

The extension of the doctrine of the *Burr* case from modern federal governmental corporations to the United States itself seems wholly unwarranted. The legislative and constitutional purpose of the Tucker Act, conferring a limited jurisdiction upon specially constituted federal courts, is quite unlike that of the corporate "sue-and-be-sued" clause, au-

thorizing proceedings in any court, state or federal, of general jurisdiction. The Tucker Act was enacted against an entirely different background and at a time when the "climate of opinion" with respect to governmental immunity was wholly different than it is today. Cf. *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, 391. The suability of the United States under the Tucker Act, like the suability of "municipalities, counties and the like" involves policies and considerations "not germane to the problem of amenability to suit of the modern federal governmental corporation." See *Federal Housing Administration* v. *Burr, supra,* at 247. The key to the *Burr* decision is not an abstract concept of "suability" but the role of the modern governmental corporation in the milieu in which it was created. The Court in the *Burr* case, by reaffirming *Buchanan* v. *Alexander,* 4 How. 20, as to assets under control of the United States as distinguished from its corporations, seems plainly to have indicated that its decision did not extend to the United States itself. And certainly the considerations which dictated decision in the *Burr* case do not warrant a similar decision here. To the contrary, every consideration of policy imperatively suggests that the jurisdiction conferred by the Tucker Act, as it was enacted in 1887, should not, without Congressional action, be tortured into a different and "modern" jurisdiction, either through judicial enlargement

or through the implementation of state statutes and state court orders.

4. The present case exemplifies in striking fashion the anomalous situation which results from seeking to blend statutes like Section 795 with the Tucker Act. The three pleaded causes of action which Sherwood alleges that Kaiser has against the United States total in excess of $10,000; this would raise a jurisdictional obstacle to maintenance of the action under the Tucker Act were it not for the limitation of Sherwood's prayer for judgment to $10,000. The court below held, correctly we believe, that the order of the New York court did not vest title to the claim in the judgment creditor. Cf. *Becker* v. *Romanzo*, 245 App. Div. 185, 281 N. Y. S. 317; *Rosen* v. *Lipshitz*, 149 Misc. 144, 266 N. Y. S. 797.[11] Accordingly, one may well inquire as to the source of Sherwood's power to remit a part of Kaiser's alleged claim, no such power having been conferred by the state court order or by Section 795; and whether at the same time Kaiser can be protected up to the full amount of his alleged

[11] This conclusion is fortified by the requirement of Section 795 that the judgment debtor be made a party defendant. In this critical respect, at least, a judgment creditor under Section 795 is unlike a receiver in supplementary proceedings, who under the express terms of Sections 804–810 of the New York Civil Practice Act (which are part of the same article of the Act as Section 795) acquires title retroactively to the date of the institution of the supplementary proceedings. Under Section 795 no title at all is conferred upon the judgment creditor.

claim, the court can retain jurisdiction, and the United States can have the benefit of *res judicata* as to the entire alleged claim. We know of no principle, in the absence of title vested in the judgment creditor, that permits him to waive part of the judgment debtor's cause of action. Cf. *Hill* v. *United States,* 40 Fed. 441 (D. Mass.).

Moreover, Kaiser's first cause of action, as pleaded by Sherwood, is on a claim unliquidated in amount, which Sherwood, by pleading, has fixed at $10,000, the jurisdictional limit under the Tucker Act. Again, one may inquire as to Sherwood's power so to limit the claim, none having been conferred by the state court order or by Section 795. At least Kaiser as a party could contest the limitation, showing that he is not a mere formal party. In a court of limited jurisdictional amount this may be jurisdictionally significant.[12]

Again, Sherwood's judgment against Kaiser is in the amount of approximately $5,500 (R. 11),[13] while the three alleged causes of action total $14,445.49 and the prayer for judgment is $10,000; hence the claim, even as remitted by the prayer,

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[12] This difficulty, although there are no New York decisions on the point, is suggestive that a person "*indebted*," within the meaning of Section 795, may mean a person against whom a liquidated claim is asserted, a suggestion reinforced by the phrase "recovery of such *debt*," the stated purpose of the proceeding authorized by Section 795.

[13] Apparently the precise principal amount of the judgment is $5,567.22. See order, Appendix, *infra*, p. 63.

exceeds Sherwood's interest by approximately $4,500. In whose favor will judgment run and whom shall the United States pay? Will a split judgment be entered if recovery exceeds $5,000? The state court order relied on by respondent is silent on these questions. Section 795 makes provision for an appropriate judgment to dispose of any recovery in excess of the sum required to pay the creditor's judgment, costs, disbursements, and expenses allowed by the court. But here the judgment to be entered is the judgment of the District Court under the Tucker Act, and it is difficult to conclude that such judgments are within the power of the New York legislature to regulate. Nor are such judgments, appropriate enough in bankruptcy courts, compatible with the simple court of claims jurisdiction of the District Courts.[14]

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[14] The holding by the court below that the two actions should be consolidated presents added difficulties. The Government has already sued the judgment debtor on the same contract in an independent action and the judgment debtor has demanded a jury trial in that action (R. 6). The court below held that the two actions should be consolidated because of "procedural advantages" (R. 30). This consolidation issue squarely raises the jury trial question. The action by the Government invokes the "general" jurisdiction of the District Court; that against the Government invokes the "exceptional jurisdiction" of the District Court "concurrent with the Court of Claims where it sits without a jury". *United States* v. *Pfitsch*, 256 U. S. 547, 550; see also *Williams* v. *United States*, 289 U. S. 553. The consolidation presents the curious situation of one court sitting in two capacities at one and the same time. Cf. *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2d). In one action jury

Neither respondent nor the court below has cited any case, and we know of none, in which an action in any way similar to this one has been sustained. The very absence of such cases, in the long history of the Tucker Act, is an indication of a common understanding that the Tucker Act never contemplated this type of action. If there has been a change in controlling opinion on the subject since enactment of the Tucker Act in 1887, or if there is now need to modernize the Tucker Act in this connection (and, unlike the case of modern governmental corporations, we know of no expression of such opinion or evidence of such need), Congress, if it sees fit, can set up a uniform scheme for such procedure, as it did in cases where the Government is the claimant (28 U. S. C.

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trial is forbidden; in the other it is required. The suggestion of the court below that the "Form of trial is determined for each issue, not for the action as a single unit" (R. 24) is beside the point. Every issue in a suit under the Tucker Act is without a jury. Moreover, in this case the *same* issues would have to be tried at once both with and without a jury. Any analogy to the union of law and equity is likewise beside the mark. In authorizing the union of law and equity cases, Congress took pains to preserve inviolate the right of jury trial (Act of June 19, 1934, c. 651, 48 Stat. 1064, 28 U. S. C. § 723c; see also Rules 38a, and 39, F. R. C. P.), preservation of which is rendered impossible in a union of Tucker Act jurisdiction and general jurisdictional. See *Stark* v. *United States*, 14 F. (2d) 616, 618 (S. D. Ohio); *Lynn* v. *United States*, 110 F. (2d) 586 (C. C. A. 5th); *cf.* Proceedings of the Washington Institute on Federal Rules (Thursday Afternoon Session, October 6, 1938) p. 79.

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§§ 748–750), or give other legislative treatment to the matter. But in the absence of such Congressional action, we perceive no justification for judicial extension of Tucker Act jurisdiction beyond the limits which, since 1887, have consistently been recognized as marking its scope.

That the entire problem of insuring payment of judgments by means of the debtor's claims against third parties is one for legislative action is plainly indicated by the various state statutes on the subject.[15] We note in the margin the variety of proceedings provided for by the laws of the different states;[16] affirmance of the judgment below

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[15] See, *e. g.*, Cal. Code of Civil Procedure Section 720; Idaho Code Ann. (1932) Section 8–504; Mich. Stat. Ann. V. 22, Section 27.2176; Nevada Comp. Laws (1929), V. 4, Section 8866; Rev. Code of Mont. (1935), V. 4, Section 9460; N. D. Comp. Laws (1913), V. 2, Section 7785; Kent. Code of Practice (Carroll 3d ed. 1900) Section 227; Williams Tenn. Code Ann. (1934), V. 6, Section 9444; Wis. Stat. (1935), Sections 267.01–267.21; Wyo. Rev. Stat. (1931) Section 89–3117.

[16] In some states, only a receiver may bring the action. Mich. Stat. Ann. V. 22, Section 27.2176; N. D. Comp. Laws (1913) Section 7785. In others the action can be brought only if the debt is more than $50. Idaho Code Ann. (1932) Section 8–504; Nev. Comp. Laws (1929) Section 8866. In Kentucky, the action may be brought even before judgment in the main action. Kent. Code of Practice (Carroll 3d ed. 1900) Section 227. Similarly, in Wisconsin, the action may be brought either before or after judgment. The debtor must be served, and may defend on any ground available to his debtor, and the third party may defend the principal action, or interplead other parties. Wis. Stat. (1935) Sections 267.01–267.21. In Tennessee the statute specifically provides that the judgment entered in the action is conclusive as be-

would expose the United States to this variety of proceedings. It seems hardly likely that Congress intended that the suability of the United States depend on the particular variations of state law. The Tucker Act on its face does not suggest it and we submit that it should not be so construed. Cf. *United States* v. *Michel,* 282 U. S. 656; *Price* v. *United States,* 174 U. S. 373; *Schillinger* v. *United States,* 155 U. S. 163.

Moreover, it must be remembered that, whatever the extent of the Tucker Act's consent to suit, it does not, unlike corporate "sue-and-be-sued" clauses, extend to suits in state courts. Consequently, suits against the United States based on state statutes like Section 795, if maintainable, must universally be tried in the federal District Courts setting as courts of claims, or in the Court of Claims. Certainly the Tucker Act did not intend that ordinary state court actions be completed in the federal courts, by the device of making the Government the third party in supplementary proceedings.

The court below rejected the Government's contention of immunity on the ground that a receiver in supplementary proceedings appointed under

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tween the third party and the judgment debtor. Williams Tenn. Code Ann. (1934) Section 9444. And some states limit recovery to the amount owed by the judgment debtor to the judgment creditor. In these latter cases, there would seem to be nothing to prevent another action by the judgment debtor. See *Ruff* v. *Ruff*, 85 Pa. St. 333; *Cameron* v. *Stollenwerck*, 6 Ala. 704; *Barton* v. *Albright*, 29 Ind. 489.

Sections 804–810 of the New York Civil Practice Act could bring the present action "without doubt" and despite the "cry of garnishment" (R. 28). To this there are several answers. First, a receiver in supplementary proceedings, unlike a judgment creditor, acquires title to the judgment creditor's claim (Sections 804–810 New York Civil Practice Act) and can sue third persons without joining the judgment debtor as a party defendant. Second, judgment for the entire recovery would be entered in favor of the receiver. Third, in such a suit there are no controversies for adjudication between the judgment debtor and the receiver or the judgment creditor. Fourth, it has never been held that a receiver in supplementary proceedings (as distinguished from a general equity receiver like those in the cases cited by the court below in this connection) can maintain a suit against the United States in the Court of Claims or in the District Court under the Tucker Act. And fifth, the decision of the Court of Claims in *Howes & Co.* v. *United States,* 24 C. Cls. 170, looks the other way.

B. THE JURISDICTION OF THE DISTRICT COURT UNDER THE TUCKER ACT IS NOT ENLARGED BY THE FEDERAL RULES OF CIVIL PROCEDURE

The basis of the ruling of the court below was "that by the Tucker Act *and* Rule 17 (b) [of the Federal Rules of Civil Procedure], consent is given to a suit brought by a judgment-creditor of the

person holding a claim against the United States, who has been authorized by state law to conduct the action" (emphasis supplied). The court did not hold that the Tucker Act alone authorized the action; it expressly found consent in the "Tucker Act *and* Rule 17 (b)". This, we believe, was fundamental error.

The Government, of course, recognizes that the Federal Rules of Civil Procedure apply to cases brought under the Tucker Act.[17] Our contention is that the Rules do not purport to and cannot operate to enlarge or alter the Tucker Act jurisdiction;[18] and that the Rules as construed and ap-

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[17] In *Lynn* v. *United States*, 110 F. (2d) 586, 588–589 (C. C. A. 5th), the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4 (d), 12 (a), 39 (c), and 55 (e) expressly contemplate suits against the United States, and nothing in the enabling act (48 Stat. 1064) suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec. 4, Act of March 3, 1887, 24 Stat. 505).

[18] There is nothing in the Federal Rules of Civil Procedure that authorizes this action in the federal courts. Rule 69 (a) of the Federal Rules provides for supplementary proceedings in aid of execution to be in accordance with state practice. But Rule 69 (a), while it operates as a conformity rule on enforcement in federal courts of federal judgments, does not authorize a federal court, upon an order of a New York court, to entertain a supplementary proceeding in aid of execution of a New York judgment. See *Bicknell* v. *Lloyd-Smith*, 109 F. (2d) 527, 528–529 (C. C. A. 2d); *cf. Rader* v. *B. & O. R. Co.*, 108 F. (2d) 980, 986 (C. C. A. 7th).

plied by the court below have an effect which is substantive and jurisdictional on three questions. The first is the right of the plaintiff to maintain the action; the second is the joinder of other parties defendant with the United States; and the third, related to the second, is the enlargement of the scope of controversy justiciable by the district courts exercising jurisdiction concurrent with the Court of Claims.

Rule 17 (b), in so far as here involved, provides that "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile." This Rule seems plainly inapplicable to the present case, quite apart from any question of the jurisdiction of the court under the Tucker Act. The respondent's capacity to sue and be sued is not in controversy. There is no suggestion that respondent is without "capacity to sue" because of infancy, insanity, coverture or alienage, or any other disqualification. And it is to those disqualifications that Rule 17 (b) obviously refers, not to the substantive right of a third person "to maintain an action" which is the subject matter of Section 795.[19] The conclusive answer, however, is that if this suit could not

[19] Under state practice a non-resident judgment creditor can take advantage of Section 795 without regard to the law of his domicile. New York Civil Practice Act, Section 773.

have been previously maintained under the Tucker Act, Rule 17 (b) does not undertake to authorize it. Rule 82, carrying out the mandate of the statute authorizing the rules, expressly provides that the rules do not extend or limit the jurisdiction of the district courts. Similarly, it is settled that the states can not enlarge or restrict the jurisdiction of the federal courts. *Munro* v. *United States,* 303 U. S. 36, 41; *Penn Co.* v. *Pennsylvania,* 294 U. S. 189, 197; *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 175. It follows as a matter of course, therefore, that the combination of a state statute, a state court order, and a federal procedural rule can not have the effect of extending the jurisdiction of the District Court under the Tucker Act.

Likewise, a non-resident judgment creditor on a federal court judgment in New York can take advantage of Section 795 in the federal court without regard to the law of his domicile. Rule 69 (a). Yet the effect of basing jurisdiction on Rule 17 (b), as the court below did, means that a proceeding under Section 795 to enforce a New York judgment may be maintained in the federal courts by a New York resident but may not be maintained by a non-resident. This is so because Rule 17 (b) expressly makes the law of the plaintiff's own domicile applicable. Moreover, the court's construction of Rule 17 (b) as referring to the right to maintain an action would render Rule 9 (a) meaningless in this connection since under Rule 9 (a) the capacity to sue need not be pleaded. Here, the allegation of the state court order was an essential allegation.

C. EVEN APART FROM THE LIMITATIONS OF THE TUCKER ACT, THE FEDERAL COURTS HAVE NO JURISDICTION TO ENTERTAIN SUPPLEMENTARY PROCEEDINGS IN CASES WHERE THEY WOULD HAVE HAD NO JURISDICTION TO ENTERTAIN THE ORIGINAL ACTION

The doctrine is well established that the courts of one jurisdiction or sovereign will not entertain supplementary proceedings in aid of execution of a judgment of a court of another jurisdiction or sovereign. Thus, the New York courts have held that they would not entertain such proceedings in aid of execution on a judgment of a court of another state (*Rocky Mountain National Bank* v. *Bliss,* 89 N. Y. 338; see also *Matter of Maltbie* v. *Lobsitz Mills Co.,* 223 N. Y. 227) or of a federal court (*Davis* v. *Bruns,* 23 Hun. (N. Y.) 648; *Tarbell* v. *Griggs,* 3 Paige (N. Y.) 207; *Tompkins* v. *Purcell,* 12 Hun. (N. Y.) 662). Similarly, the federal courts in New York have held that they would not entertain proceedings ancillary to original suits in the state courts. *Claflin* v. *McDermott,* 12 Fed. 375 (S. D. N. Y.); *Walser* v. *Seligman,* 13 Fed. 415 (S. D. N. Y.); see also *National Tube Works Co.* v. *Ballou,* 146 U. S. 517.

The case at bar is analogous to the cases where attempt was made to remove to the federal court a garnishment suit brought in aid of execution on a state court judgment, removal being sought on the ground of diversity of citizenship between the garnishor and garnishee. The garnishment proceedings were remanded to the state court because

they were not independent suits within the meaning of the removal statutes, but merely modes of execution, inseparably connected with the original action, over which the federal courts had no jurisdiction. *Weber* v. *Humphreys,* 5 Dillon 223 (E. D. Mo.); *Pratt* v. *Albright,* 9 Fed. 634 (E. D. Wis.); *Buford* v. *Strother,* 10 Fed. 406 (D. Iowa); *Poole* v. *Thatcherdeft,* 19 Fed. 49 (D. Minn.); *King* v. *Shepherd,* 20 Fed. 337 (N. D. Iowa); *Brucker* v. *Georgia Casualty Co.,* 14 F. (2d) 688 (E. D. Mo.); *Lahman* v. *Supernawt,* 47 F. (2d) 610 (N. D. Okla.). Similarly, after judgment in a state court, if a third party claims as his the property of the defendant, the proceeding involving that issue is not removable to the federal courts because it is only supplementary to the original action. *Bank* v. *Turnbull & Co.,* 16 Wall. 190; *Chapman* v. *Borger,* 4 Dillon 557; *Flash* v. *Dillon,* 22 Fed. 1 (E. D. Tex.).

In *Mutual Reserve Fund Life Assn.* v. *Phelps,* 190 U. S. 147, a judgment was recovered in a Kentucky court against a foreign corporation. After execution was returned *nulla bona,* the judgment creditor in aid of execution on the judgment sought the appointment of a receiver to take charge of the corporation's business and to collect its debts, the receivership to continue until the judgment was paid. The corporation applied for removal to the federal court which was denied. It then commenced an action in the federal court against the

receiver and the judgment creditor to enjoin them from proceeding further. The suit was dismissed, this Court saying (p. 159):

> Again, the proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditor's bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of *nulla bona*. It is what is known as a supplementary proceeding * * *. It was initiated by the filing of an amended and supplementary petition. It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. As such it was not subject to removal to the Federal court, the time therefor prescribed by statute having passed. * * * Being a mere continuation of the action at law, and not removable to the Federal court, the latter had no jurisdiction to enjoin the proceedings under it.

The present case seems to be the first reported instance in which such supplementary proceedings were originally instituted in the federal courts. But the principle that the jurisdiction of the federal courts does not extend to supplementary proceedings where the principal action could not have been brought within the federal jurisdiction seems equally applicable whether the question is raised in

connection with an attempted removal of such proceedings to the federal courts or in connection with the original institution of such procedings in the federal courts. And the principle applies with peculiar force where the jurisdiction of the federal courts is invoked under the Tucker Act—a jurisdiction which, as we have shown, is far more limited than the "general" jurisdiction of the District Courts.[20]

II

THE MAINTENANCE OF THIS ACTION IS PRECLUDED BY R. S. § 3477

Under the express provisions of R. S. § 3477 (31 U. S. C., § 203) the order of the state court authorizing the respondent to prosecute Kaiser's claim against the United States is "absolutely null and void". The statute provides as follows:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein,

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[20] *Lackawanna Coal & Iron Co.* v. *Bates*, 56 Fed. 737 (W. D. Mo.), and *London & Lancashire Indemnity Co.* v. *Courtney*, 106 F. (2d) 277 (C. C. A. 10th), holding that the particular actions there involved were independent suits and not merely supplementary proceedings and hence were removable to the federal courts, are only applicable to the narrow question of whether the present suit is supplementary. Even on that narrow question those cases are distinguishable because Section 795, unlike the statutes there involved, requires joinder of the original defendant and permits the order of the court in the original action to regulate various aspects of the proceeding which the judgment creditor is authorized to institute.

whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, *after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.* Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments for rent of post-office quarters made by postmasters to duly authorized agents of the lessors. [Emphasis supplied.]

One purpose of the statute was to guard against the danger that by the transfer of a claim against the United States, "the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest." *Good-*

man v. *Niblack*, 102 U. S. 556, 560. No less important, however, was the purpose of preventing the Government from being "harassed by multiplying the number of persons with whom it had to deal" and from "becoming embroiled in conflicting claims, with delay and embarrassment". *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Martin* v. *National Surety Co.*, 300 U. S. 588, 594; *Nutt* v. *Knut*, 200 U. S. 12, 20.

In the case at bar, there is no contention that the conditions of the statute, if applicable, have been met. Kaiser's claim has not been allowed, there has been no "ascertainment of the amount due" and no warrant for its payment has been issued. Not only does the present transfer fail to meet these conditions, but it appears affirmatively that the United States has brought suit against Kaiser for breach of the very contract on which the present action is based. Under these circumstances it is apparent that sustaining respondent's position would defeat the purpose of the statute.

1. The order of the state court obviously multiplies the number of persons with whom the Government must deal. As we have pointed out, Kaiser's claim against the United States, as alleged by Sherwood, is in the amount of approximately $15,000, and a recovery of $10,000 is sought (R. 15–19). Sherwood's claim against Kaiser, however, is only for approximately $5,500 and his interest in any recovery is limited accord-

ingly. Consequently, any judgment rendered by the District Court against the United States for an amount in excess of $5,500 would have to provide for the disposition of the surplus; this, as we have previously observed, is expressly contemplated by Section 795 of the New York Civil Practice Act. The surplus would necessarily be awarded either to Kaiser, who is a party defendant, or to other judgment creditors who may be authorized by the New York courts to participate in the proceeding (see p. 18, *supra*). It is apparent, therefore, that the maintenance of a Section 795 proceeding against the United States means that the Government may be "embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction", a result which R. S. § 3477 was specifically designed to avoid. *Goodman* v. *Niblack*, 102 U. S. 556; *Hobbs* v. *McLean*, 117 U. S. 567, 576; *Martin* v. *National Surety Co.*, 300 U. S. 588, 594.

This is not a mere theoretical consideration. If the decision below be sustained, negotiations for the adjustment and settlement of Kaiser's and the Government's claims against each other cannot succeed without the consent and cooperation of a third party and, indeed, of any other creditor of Kaiser who may be authorized to maintain an action on Kaiser's claim. In this connection, it is significant that the Assignment of Claims Act of

1940 (Public, No. 811, c. 779, 76th Cong., 3d Sess.), which relaxes the prohibition of R. S. § 3477 in certain cases, prohibits partial assignments. See also H. Rep. No. 2925, 76th Cong., 3d Sess.; S. Rep. No. 2136, 76th Cong., 3d Sess.

The Government would be subject to the same harassment even if the respondent's judgment equalled or exceeded the amount of Kaiser's claim against the United States. The United States would still be required to deal with both the original claimant and his judgment creditor and such dealings would be embarrassed by the conflicting interests of the two claimants. The United States is suing Kaiser in a separate proceeding for breach of the contract on which Kaiser's claim is based. Kaiser, in that action, could defend or admit liability. He might also seek a compromise releasing his claim in exchange for a release from the Government, or for a reduction in the Government's demand. These things he is precluded from doing if Sherwood is permitted in effect to attach his claim. The last paragraph of the state court order forbids Kaiser from making any "disposition" of his claim against the United States; this prohibition, operating in form against the claimant, operates in effect against the United States by preventing it from obtaining a release of the claim from Kaiser or otherwise adjusting the claim.

Sherwood certainly would have no interest in releasing Kaiser's claim against the United States in return for a release of the Government's claim against Kaiser. Sherwood is not a general representative succeeding to all of Kaiser's assets and liabilities. His sole interest is in satisfying his judgment, and the risk to him in prosecuting Kaiser's claim to judgment may be less than it would be to Kaiser since Sherwood may have execution on any other assets which Kaiser may have. Moreover, while Sherwood incurs the risk that judgment on the Government's claim may defeat any recovery on Kaiser's claim, he does not share the further risk facing Kaiser of liability on an affirmative judgment in favor of the United States.

It was for reasons of this character that the Court of Claims early held invalid an order of a state court appointing a receiver to prosecute an individual claim against the United States. *Howes & Co.* v. *United States,* 24 C. Cls. 170. In the *Howes* case, a judgment creditor whose judgment remained unsatisfied filed a supplementary petition in a state court praying for the appointment of a receiver of the claim of Howes & Co. against the United States for the undistributed portion of an award which the company was prosecuting before the Court of Commissioners of Alabama Claims. The state court appointed the receiver, who attempted to recover

from the Government. The Court of Claims, holding the order void under R. S. § 3477, stated (p. 183–184):

> One of the obvious benefits to the United States to be derived from the statute making assignment of claims void was the right of the officers of the Government to have the original creditor or, in case of death or general assignment of his estate, his successor to all his business affairs to deal with in settling accounts, unembarrassed by controversies between him and his creditors. The value of that right is clearly shown in this very case. After appointment of this receiver, the Government made a settlement with Jabez Howes, one of the original claimants, by which he released his share in the claims now in suit and ratified and confirmed the action of the accounting officers in crediting one-half on a judgment debt against him and others in favor of the United States; and this was done to assist in effecting a settlement and discharge of the latter judgment. This release would not have been valid if the transfer by the California court were sustained and the Secretary of the Treasury were bound to recognize it.
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> * * * * *
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> If attachments, subrogations, and assignments, such as those relied upon by the claimant, Wells, as receiver, should be upheld, the Government would not only be de-

> prived of the right to settle with those claimants to whom it was originally indebted, whose estates became thus attached, but might also be involved in controversies between such claimants and their creditors as well as between conflicting attaching creditors in different courts, contrary to the spirit if not the letter of the law, passed to prevent frauds upon the Treasury of the United States.

2. The court below was of the opinion that R. S. § 3477 was no bar to this action because Section 795 of the New York Civil Practice Act "does not bring about an assignment or transfer of title of the debt to the judgment-creditor, but merely confers upon him a power to bring an action", and for the further reason that "if Section 795 does provide for an actual assignment of the claim, nevertheless it is then an assignment by operation of law" and therefore not within the inhibition of R. S. § 3477 (R. 26).

The suggestion that Section 795 of the New York Civil Practice Act does not bring about a transfer or assignment of the claim is beside the mark, since R. S. § 3477 invalidates "powers of attorney, orders, or other authorities for receiving payment", as well as assignments or transfers.

Nor is there anything in the language or policy of R. S. § 3477 which renders the statute inapplicable to all assignments by operation of law. As this Court observed in *Spofford* v. *Kirk*, 97 U. S. 484,

488–490, "It would seem to be impossible to use language more comprehensive than this". And in *Goodman* v. *Niblack,* 102 U. S. 556, the Court, although holding the particular assignment there involved to be beyond the purview of the statute, specifically recognized that the statutory language "is broad enough * * * to include transfers by operation of law * * * *." Where, as in the case at bar, an assignment by operation of law may result in multiplying the number of persons with whom the Government has to deal and may thereby embarrass the conduct of the Government's business, the fundamental policy of the law would seem to require that the transfer be held violative of the statutory prohibition.

It is true that in a number of cases, this Court has said that certain transfers by operation of law are beyond the scope of R. S. § 3477. *Erwin* v. *United States,* 97 U. S. 392, 397; *Price* v. *Forrest,* 173 U. S. 410; *Seaboard Air Line Ry.* v. *United States,* 256 U. S. 655; *Western Pac. R. R. Co.* v. *United States,* 268 U. S. 271. But the Court has made a similar determination with respect to certain types of voluntary assignments. *Goodman* v. *Niblack,* 102 U. S. 556. Reading both lines of authority in conjunction, it is clear that all the decisions were based upon the policy of the Act and not the form of the transfer, and that any transfer which conflicts with both the letter and policy of the statute falls within its sphere of operation, whether the transfer be by operation of law or not.

The type of situation to which R. S. § 3477 is inapplicable is that presented where all of the claimant's property has been transferred by operation of law to the claimant's successor or representative, whether by descent (cf. *Erwin* v. *United States, supra*), consolidation in corporate reorganization (*Seaboard Air Line Ry.* v. *United States, supra*), purchase at a judicial sale in such reorganization (*Western Pacific R. R. Co.* v. *United States, supra*), or through some other change in the claimant's legal status. Similarly, R. S. § 3477 is inapplicable to a purely voluntary assignment of all of the claimant's assets for the benefit of creditors. *Goodman* v. *Niblack*, 102 U. S. 556. In such cases there is a complete substitution of an authorized representative in the place and stead of the original claimant. In this type of situation, it is necessary to withdraw the transfer from the operation of R. S. § 3477 in order to effectuate the policy of the statutes which provide for the appointment of receivers and trustees in bankruptcy, and executors and administrators of decedents' estates, and to prevent unjust enrichment to the United States by way of windfall. In cases of this class it is not only obvious that there must be representative action, but it is likewise clear that such representative control does not embarrass the Government which simply deals with the substituted representative as it would have dealt with the claimant if there had been no sub-

stitution. Prior to the death or bankruptcy the Government could sue the claimant, or it could counterclaim against him if the claimant sued first, and recover an affirmative judgment. It is in precisely the same position with reference to the executor, administrator, or trustee in bankruptcy.[21]

The only cases in which transfers of claims against the United States have been sustained by this Court in the absence of a general transfer of all the claimant's assets are those where the claim had already been adjusted and allowed and where, therefore, the Government was merely in the position of a stakeholder, the duty of the Government officer to pay being purely ministerial and enforceable by mandamus. For example, in *Price* v. *For-*

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[21] It is true that R. S. § 3477 has been held inapplicable to the purchase at a judicial sale of all the assets of a corporation in reorganization (*Western Pacific R. R. Co.* v. *United States*, *supra*) and that the purchaser at such a sale does not necessarily succeed to all the liabilities of the original claimant. In the *Western Pacific* case, however, no question of embarrassment to the Government in the settlement of any counterclaim was involved. In view of the nature of reorganization proceedings, no such question could arise even if the Government had a claim against the original corporation. In such proceedings, all claims against the original corporation would be presented to the receiver and allowed or disallowed prior to the sale in order to determine the claimant's status under the reorganization plan. The respective claims of the Government and the original corporation would be adjusted and the Government's position as net creditor or debtor would be determined prior to sale. As a practical matter, therefore, the Government would never be required to deal with more than one person in a reorganization case.

rest, 173 U. S. 410, relied on by the court below, a debtor was directed by court order to deliver and endorse to a receiver any draft obtained from the Government in payment of the debtor's claim and to consent in writing that any balance which might be allowed should be paid to the receiver. After the claimant's death, the debtor's heirs were enjoined from demanding or receiving payment from the Government. The question whether the Government officials could be enjoined from paying any award to the original claimant or his heirs was not decided. The Court said (p. 423, 424):

> We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the government from withdrawing the proceeds of such claim from the reach of his creditors; *provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the Government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States.* * * * Even if it be true that the final order of the state court in relation to the money in question would not impose any legal duty upon the officers of the Treasury, it does not follow that the order of court appointing the receiver would be null and

> void, as between those who are parties to the cause and who are before the court. [Emphasis supplied.]

Similary, in *Houston* v. *Ormes*, 252 U. S. 469, the Court held that R. S. § 3477 was not a bar to an action seeking to establish a lien for attorneys' fees on a fund appropriated by Congress to a specific claimant and to require the Secretary of the Treasury to pay the fund to a receiver. The decision was placed upon the ground that the statute was inapplicable to an assignment by operation of law "after the claim has been allowed." *Id.* at 474.[22]

The foregoing analysis demonstrates, we believe, that the holding of the court below that R. S. § 3477 is not a bar to the maintenance of the present

[22] The decisions of the lower federal courts invoked by respondent (Br. in Opp., p. 5) are not in point. All of them involved a controversy between private persons as to the ownership of the funds after payment had been made by the Government to the original claimant or his estate. In one of the cases, *Bray* v. *United States Fidelity & Guaranty Co.*, 267 Fed. 533 (C. C. A. 4th), the question of the application of R. S. 3477 was not even raised. The statement in *In re Gerstenzang*, 5 F. Supp. 904 (S. D. N. Y.), that R. S. 3477 is inapplicable to a judicial sale of a claim for refund of customs duties was entirely *obiter*, the court holding that a sale of "stocks" of a bankrupt did not convey title to a "claim" against the Government. In *In re Pottasch Bros. Co.*, 79 F. (2d) 613 (C. C. A. 2d), the Government had paid the claim to the estate of the original claimant and the court merely held that creditors claiming under an order of a referee in bankruptcy entered prior to such payment were entitled to receive the fund from the trustee.

action finds no support in the decisions of this Court.[23] And since, as we have shown, the type of transfer of claim provided for by Section 795 of the New York Civil Practice Act violates both the letter and purpose of the statutory bar, we believe it evident that the court below erred in reversing the order of the District Court dismissing the complaint.

III

SECTION 795 OF THE NEW YORK CIVIL PRACTICE ACT DOES NOT AUTHORIZE SUPPLEMENTARY PROCEEDINGS AGAINST THE UNITED STATES

If the Court should reject the contentions advanced in the preceding sections of this brief, a further question of local law must be examined, namely, whether Section 795 of the New York Civil Practice Act authorizes actions against the United States. The section, in terms, provides for supplementary proceedings against a "person or corporation * * * indebted to the judgment-debtor". It is the Government's position that the

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[23] The question whether garnishment proceedings are in violation of R. S. 3477 was not considered by the Court in *Federal Housing Administration* v. *Burr*, *supra*. Since the debtor's claim was admittedly due and owing, the transfer did not come within the operation of R. S. 3477 (cf. *Houston* v. *Ormes*, 252 U. S. 469, 474) and the Administration did not invoke the statute as a defense, although the Government's brief in this Court pointed to R. S. 3477 as indicating a policy in a related field. It may well be, moreover, that government corporations, to which the Federal Housing Administration was assimilated in the *Burr* case, are not "the United States" within the meaning of R. S. 3477. Cf. *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1.

term "person" as used in Section 795 does not include the sovereign, state or federal, and that, in any event, it does not include the United States.

The New York state courts have not yet construed the statute on this point. The court below, "With some hesitation", ruled that "the sovereign is included within the word 'person' in Section 795" (R. 30) and that "If the legislature intended to include the state as a person in Section 795, it would seem to follow that the United States is likewise so included." (R. 30.) The court considered that "speculation over actual intent [of the New York legislature] is futile" and, making its own "estimate of whether or not the injuries done to the sovereign by including it within the purview of the statute are so great that the legislature can be presumed not to have intended them" (R. 29), concluded that there was reason to believe that the New York legislature might think that any embarrassment to the state by these proceedings might be "outweighed by the increased efficiency in execution which might thus be achieved." (R. 29.)

The conclusion that the State of New York is a person within the meaning of Section 795 seems erroneous. There is nothing explicit in the entire chapter on supplementary proceedings (New York Civil Practice Act, Sections 773–810) to indicate that the State of New York is to be so included. The presumption is, of course, that the sovereign is included in the scope of statutes extending bene-

fits and protections.[24] *Stanley* v. *Schwalby,* 147 U. S. 508, 514–517; *Dugan* v. *United States,* 3 Wheat. 172, 181; *Cotton* v. *United States,* 11 How. 228, 231. But it is elementary that the state is not bound by the general terms of a statute which would trench upon its sovereign rights, injuriously affect its capacity to perform its functions, or establish an otherwise forbidden right of action against it. *Stanley* v. *Schwalby, supra,* 514–517; *United States* v. *Herron,* 20 Wall. 251; *Guarantee Co.* v. *Title Guaranty Co.,* 224 U. S. 152; Sutherland, *Statutory Construction* (2d ed. 1904) Secs. 514, 694; Endlich, *Interpretation of Statutes* (1888) Secs. 161, 167. This same principle has been embodied in Section 37 of the New York General Construction Law which defines "person" so as to exclude the sovereign except in the case of a person whose property may be the subject of an offense. See Curtis, *Statutes and Statutory Construction,* 1 McKinney's *Consolidated Laws of New York,* Sec. 65; cf. *Saranac L. & T. Co.* v. *Roberts,* 195 N. Y. 303, 323. It is significant that Section 684 of the Civil Practice Act, providing for the garnishment of wages—a provision closely related to Section 795—originally contained no express reference to the garnishment of wages of public employees. The New York courts, therefore, construed it to exclude wages of city and state

[24] We urge, for example, in *United States* v. *Cooper,* No. 484, this Term, that the United States takes the benefits of Section 7 of the Sherman Act.

agencies. *Rosenstock* v. *City of New York,* 101 App. Div. 9, 91 N. Y. Supp. 737 (1905); *Osterhoudt* v. *Stade,* 133 App. Div. 83, 117 N. Y. Supp. 809 (1909). Section 684 was then amended so as to include city and state employees. New York Laws 1905, c. 175; New York Laws 1910, c. 317; cf. *Rickey* v. *Slingerland,* 143 Misc. 583, 256 N. Y. Supp. 901. Moreover, even after this amendment, Section 684 has been held inapplicable to the United States. See p. 54, *infra.* In other statutes, too, when the New York legislature has intended the sovereign to be included it has expressly so provided. See, e. g. New York Court of Claims Act, Section 17 (examination before trial in suits brought in the New York Court of Claims).

In view of the doctrine that the state is not bound by the general terms of a statute imposing burdens, the silence of the present statute must be construed so as to exclude the sovereign. See *Minor* v. *Erie R. Co.,* 171 N. Y. 566; *People* v. Miller, 94 App. Div. 567, 88 N. Y. S. 253.[25] At least in the absence of an authoritative construction by the state courts that Section 795 includes the state as a "person indebted", the court below should not have given the statute a construction damaging to the state. The fact that in *Brearton*

[25] The New York courts have held that municipal corporations, not being specifically mentioned, are not included in the sections of the Civil Practice Act dealing with discovery and examination before trial. *Bush Terminal Co.* v. *City of New York,* 259 N. Y. 509; *Davidson* v. *City of New York,* 221 N. Y. 487; *Berryman* v. *Board of Education of City of Buffalo,* 12 N. Y. S. (2d) 135.

v. *Morgan,* 257 App. Div. (N. Y.) 34, *Hollywood Garage Corp.* v. *Pettis & Co.,* 169 Misc. 906, 9 N. Y. S. (2d) 379, and *Heilman* v. *St. Cloud Restaurant, Inc.,* 164 Misc. 15, 297 N. Y. Supp. 111, the State Comptroller appeared in supplementary proceedings is immaterial. The question was not raised in those cases, the Comptroller having other defenses.

Even if the State of New York is a "person" within the meaning of Section 795, it by no means follows that the United States is such a "person." The intent of the New York legislature can not control the sovereign immunity of the United States. *Federal Land Bank* v. *Priddy,* 295 U. S. 229, 231. And, as has been amply demonstrated above, there is at least a substantial doubt whether the United States has consented to be sued in supplementary proceedings instituted under Section 795. The New York statute should, therefore, be construed so as to exclude such actions against the United States in order to avoid grave doubts as to its constitutionality.

The lower New York courts have consistently recognized that the United States is not subject to garnishment under Section 684 of the Civil Practice Act. *Dibner* v. *Cousminer,* 157 Misc. 229, 230, 283 N. Y. Supp. 369, 370; *Bool Floral Co., Inc.* v. *Coyne,* 158 Misc. 13, 14, 284 N. Y. Supp. 960, 961; *Cross Bay Lumber Co.* v. *Samoa,* 161 Misc. 458, 293 N. Y. Supp. 794; *Bowes* v. *Perkins,* 169 Misc. 624, 8 N. Y. S. (2d) 525; see 54 Harv. L. Rev. 518, 519. There is no reason to suppose that the local courts

would reach a different conclusion in construing Section 795, and, in the absence of any controlling decision by the highest court of the state, the rulings of the lower courts should be followed by the federal courts on questions of state practice. *West* v. *American Tel. & Tel. Co.*, Nos. 44, 45, present Term; *Six Companies of California* v. *Joint Highway District*, No. 267, present Term; *Fidelity Union Trust Co.* v. *Field*, No. 32, present Term; *Stoner* v. *New York Life Ins. Co.*, No. 74, present Term. The Supreme Court of Queens County, it is true, authorized proceedings against the United States in this case. But its order was entered *ex parte* and without an opinion and can not, therefore, be considered as a construction of Section 795.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed and the order of the District Court dismissing the complaint should be affirmed.

Respectfully submitted.

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JANUARY, 1941.

APPENDIX

1. The pertinent sections of the New York Civil Practice Act provide as follows:

> § 773. IN WHAT CASES JUDGMENT CREDITORS MAY MAINTAIN PROCEEDINGS. To entitle a judgment creditor to maintain a special proceeding authorized by this article, the judgment must have been rendered in any sum by any court of this state, whether or not of record. A decree or order awarding the payment of money shall be deemed a judgment for the purpose of this article. A proceeding may be maintained until such judgment is satisfied, vacated or barred by the statute of limitations.
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> § 795. ACTION BY JUDGMENT CREDITOR AGAINST THIRD PARTY. Where it appears from the examination or testimony taken or other proof satisfactory to the court that a person or corporation is indebted to the judgment debtor, the court may make an order authorizing the judgment creditor to maintain an action against such person or corporation for the recovery of such debt. Such order may also forbid the transfer or other disposition of such debt until an action can be commenced and prosecuted to judgment and may direct that the papers or proof in the possession or control of the debtor and necessary in the prosecution of such action be delivered to the creditor or impounded in court. Such order or the judgment entered in the authorized action may provide for the disposition of any moneys in excess of the sum required to pay the creditor's judgment, costs, disbursements

and expenses allowed by the court. Such action by a judgment creditor against the debtor of the judgment debtor shall make the judgment debtor a party defendant, and costs shall be awarded as prescribed by law; but if judgment be in favor of the judgment creditor and against the debtor of the judgment debtor, and the debtor of the judgment debtor did not dispute the indebtedness, then costs are not to be awarded against the debtor of the judgment debtor.

§ 807. VESTING OF PROPERTY IN RECEIVER. The property of the judgment debtor, whether acquired before or any time after the appointment of a receiver, is vested in a receiver who has duly qualified, from time of filing the order appointing him or extending his receivership, as the case may be, subject to the following exceptions in favor of a purchaser in good faith without notice and for valuable consideration.

1. Real property is vested in the receiver only from the time when the order or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

2. Where the judgment debtor at the time when the order is filed resides in another county of the state, his personal property is vested in the receiver only from the time when a certified copy of the order is filed with the clerk of the county where he resides.

2. Section 37 of the New York General Construction Law provides as follows:

SECTION 37. PERSON. The term person includes a corporation and a joint stock association. When used to designate a party whose property may be the subject of any

offense, the term person also includes the state, or any other state, government, or country which may lawfully own property in the state.

3. The Tucker Act, Title 28, Section 41 (20) of the United States Code, Act of March 3, 1887, c. 359, Sections 1, 2, 24 Stat. 505, as amended, provides that the district courts shall have original jurisdiction as follows:

* * * * *

(20) SUITS AGAINST THE UNITED STATES. Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

4. Title 31, Section 203, of the United States Code (R. S. 3477) provides as follows:

§ 203. ASSIGNMENTS OF CLAIMS VOID. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether

absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. * * *

5. Title 28, Sections 748 to 750, of the United States Code (R. S. Secs. 935, 936, 937), provide as follows:

§ 748. GARNISHEES IN SUITS BY UNITED STATES AGAINST A CORPORATION. In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the

sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States. No judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, nor until the sum in which the garnishee stands indebted is actually due.

§ 749. SAME; ISSUE TENDERED ON DENIAL OF INDEBTEDNESS. When any person summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit.

§ 750. SAME; GARNISHEE FAILING TO APPEAR. If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court.

6. The pertinent Rules of the Federal Rules of Civil Procedure are as follows:

Rule 1. SCOPE OF RULES. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 9. PLEADING SPECIAL MATTERS.

(a) *Capacity.*—It is not necessary to aver the capacity of a party to sue or be sued or

the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

Rule 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY.

(b) *Capacity to Sue or Be Sued.*—The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States.

Rule 69. EXECUTION.

(a) *In General.*—Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accord-

ance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

Rule 82. JURISDICTION AND VENUE UNAFFECTED. These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein.

7. The order of the Supreme Court of the State of New York purporting to authorize the maintenance of this action is as follows:

At a Special Term of the Supreme Court of the State of New York, Part II thereof, held in and for the County of Kings, at the Courthouse thereof, Fulton and Joralemon Streets, Borough of Brooklyn, City of New York, on the 8th day of February, 1939.

Present: HON. MEIER STEINBRINK, *Justice.*

In the Matter of Supplementary Proceedings:

JACOB L. SHERWOOD, JUDGMENT CREDITOR

against

FREDERICK M. KAISER, JUDGMENT DEBTOR

Upon reading and filing the annexed affidavit of MILTON U. COPLAND, sworn to February 7, 1939, and upon the judgment dated November 29, 1935, and upon all the proceedings heretofore had herein, it is, on mo-

tion of M. CARL LEVINE, MORGULAS & FOREMAN, attorneys for the judgment creditor herein

ORDERED that JACOB L. SHERWOOD, residing at 25–31 88th Street, Jackson Heights, Borough of Queens, City of New York, be and he hereby is authorized and empowered to commence and maintain an action at law against the United States of America under the Act of March 3, 1887, C. 359, Sec. 1, 2, 24, Stat. 505, and amendments thereto, commonly known as the Tucker Act, nunc pro tunc as of September 1, 1937, for damages to FREDERICK M. KAISER, the judgment debtor, arising out of the contract dated January 27, 1933, entered into between said Frederick M. Kaiser and the United States of America for the construction and completion of the Post Office and East Greenwich, Rhode Island, and it is further

ORDERED that the judgment creditor herein be entitled out of any moneys that may be recovered in said action to a sum sufficient to cover the amount of the judgment of $5,567.22 entered on the 29th day of November, 1935, together with interest thereon, as well as costs, disbursements and expenses which may be allowed by the Court, and it is further

ORDERED that said judgment debtor be and he hereby is forbidden to make or suffer any transfer or other disposition of said claim against the United States of America, as aforesaid.

ENTER in Queens County.

STEINBRINK, *J. S. C.*

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No. 500

IN THE

Supreme Court of the United States

October Term, 1940

UNITED STATES OF AMERICA,
Petitioner,

vs.

JACOB L. SHERWOOD.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

UNITED STATES OF AMERICA, Petitioner, vs. JACOB L. SHERWOOD.	No. 500

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respondent, Jacob L. Sherwood, in opposition to the instant petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the judgment of the United States Circuit Court of Appeals entered herein on July 12, 1940, prays that said petition be denied.

Statement.

Respondent in this brief will make no attempt to set forth the arguments which are so fully and ably presented in the opinion of the Court below (R. 33-42), reported in 112 F. (2d) 587, to which we respectfully refer the Court. Accordingly, the argument herein will be confined to a brief answer to the specifications of error set forth in the Government's petition at page 5 thereof, upon which its contentions are based.

In Answer to Specification of Errors to be Urged.

A. Specifications 1 to 4.

The first four specifications of error in effect deal with the construction of Rule 17(b) of the Rules of Civil Procedure as controlling in Tucker Act cases. This rule, which states that "the capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile, is determinative of respondent's capacity to sue in the instant action, acting as he did by virtue of an order of the New York State Supreme Court, which permitted him to sue as a judgment creditor the United States of America, and its judgment debtor, Frederick M. Kaiser.

The petitioner in the Court below urged that the Federal rules are inapplicable to Tucker Act cases. After a thorough consideration of the purposes of the rules, and of the all-inclusive context to be found in the rules themselves, the Government's contentions were rejected by the Court for the following reasons (R. 35-37):

1—Rule 81 expressly provides for exceptions to the cases to be governed by the Federal Rules of Civil Procedure, and actions brought under the Tucker Act are not so excepted.

2—There is a manifest intent from a reading of the rules that they are intended to apply to all civil actions, including actions against the United States, and provision is specifically made for the United States as a party in such actions.

3—The Tucker Act itself, 28 U. S. C. A., Section 761, directs a uniformity in procedure when actions might be brought thereunder against the United States in the District Courts. Such actions against the United States would necessarily be included under the rules there applicable, except where the Tucker Act expressly provides otherwise.

4—The doctrine of *Waite* v. *United States,* 57 Ct. Cl. 546, is procedural and has no effect on the jurisdiction of District Courts.

The petitioner stops short of argument that the Federal Rules of Civil Procedure would not apply to Tucker Act cases with respect to such ordinary pre-trial procedure in the District Courts, such as amendments, depositions, subpoenas, and the like, for, as the Court below has pointed out (R. 36), we might well ask what rules of procedure would be followed if the present rules were held inapplicable. It would seem contrary to their intent to hold that in the matter of respondent's capacity to sue, the rules should be held to be inoperative, whereas in other respects their application is unquestioned.

The authority cited by petitioner in support of its contention is the case of *Lynn* v. *United States,* 110 F. (2d) 586. The Court in that case based its view that the rules had no applicability to Tucker Act cases, upon certain provisions in the Act, 28 U. S. C. A., Section 761. Not only did the Court indulge in no analysis of the new Federal rules, but, as found by the Court below, the statute itself furnishes compelling refutation.

B. Specification 5.

The fifth specification of error urged is that the joinder of respondent's judgment debtor as a co-defendant with the United States did not deprive the District Court of jurisdiction. Here, again, the petitioner raises the cry that the Federal rules are to have no meaning with respect to Tucker Act procedure, and that the present action is to be governed by Court of Claims rulings. The order of the Supreme Court of the State of New York would thereby be entirely nullified. No controversy remains as between the judgment creditor and judgment debtor as asserted by petitioner at page 11.

The provision for the joinder of the judgment debtor as a party defendant in such an action is clearly for the protection of said judgment debtor in the presentation of his claim. The sole purpose of this provision would

seem not to further any dispute between the judgment creditor and the judgment debtor, but simply to assure the judgment debtor of complete justice with relation to its claim. The necessity for this would be apparent if the judgment creditor for some reason did not sue for the full amount, or incorrectly stated the facts which might affect the judgment debtor's ability to recover any excess over the amount owed the judgment creditor. In any event, a single claim would be the subject of the action and the adjudication would be solely with respect to that claim. The Court below found no reason why the judgment debtor could not be a co-defendant without destroying jurisdiction.

C. Specification 6.

Petitioner urges substantively that the Court erred in holding that respondent could maintain the present action under Section 795 of the New York Civil Practice Act, in that such action constituted a violation of Revised Statutes, Section 3477, 31 U. S. C. 203.

To make this contention with success, it is submitted that two considerations must be surmounted. First, it must be shown that there was a transfer or assignment such as Revised Statutes, Section 3477, contemplated, and, secondly, that if such a transfer were made, it would not be a transfer by operation of law. The Court below held that the respondent herein, suing by virtue of Section 795 of the New York Civil Practice Act, did not sue as an assignee within the purview of Revised Statutes, Section 3477, but, on the contrary, the New York act merely confers upon the judgment creditor the power to bring such an action. The statute recites no such assignment, nor does it seem necessary to carry out its purpose.

Even if Section 795 should be construed to work an actual assignment, nevertheless this assignment, having been made by virtue of the order of the Supreme Court of the State of New York, was an assignment by operation of law. Certainly, it cannot be considered a volun-

tary assignment which alone is within the statutory prohibition, as enunciated by the Court in *Western Pacific R.R. Co.* v. *United States,* 268 U. S. 271.

The disposition of a claim against the United States by order of a State Court has in fact been held to be an assignment by operation of law.

Price v. *Forrest,* 173 U. S. 410.

Furthermore, there is no basis for petitioner's claim that in all assignments of claims against the United States, the assignee must be a general assignee, thus creating no change in the claimant's legal status as against the Government. This argument is clearly fallacious in that there are many instances of single claims sold by order of a Referee in Bankruptcy to a third party who clearly would not be in the same position as the original claimant, for the transferee of such a claim would not be subject to any counterclaims, or any other offsets which the Government might otherwise maintain.

In re Pottasch Bros. Co., 79 F. (2d) 613.
In re U. S. Fidelity & Guaranty Company, 267 Fed. 533.
In re Gerstenzang, 5 F. Supp. 904.

The eighth specification of error urged is not essential to this appeal, and consequently will not be discussed, and the ninth specification is simply the general specification for reversal.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

M. Carl Levine, Morgulas & Foreman,
Attorneys for Respondent,
By David Morgulas.

APPENDIX.

Section 761 of the Tucker Act, 28 U. S. C., Section 761, 24 Stat. 560, provides:

PROCEEDINGS IN SUITS AGAINST UNITED STATES.

The course of procedure for the District Courts and the Court of Claims in cases under Section 41, paragraph 20, and Section 250 of this title, insofar as applicable and not inconsistent with Sections 762 to 765, and the procedure prescribed for the Court of Claims shall be in accordance with the established rules of said respective Courts, and of such addition and modifications thereof as said Courts may adopt.

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No. 500

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA,
Petitioner,

v.

JACOB L. SHERWOOD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 500

THE UNITED STATES OF AMERICA,
Petitioner,

v.

JACOB L. SHERWOOD.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Statement.

Respondent herein is a judgment-creditor of one Kaiser by judgment obtained in the New York State Supreme Court, the judgment having been taken by default after personal service on Kaiser. Both respondent and Kaiser were and still are domiciled in the City of New York.

After the judgment was obtained, through examinations in supplementary proceedings of Kaiser, it was discovered that said Kaiser had entered into a contract with the United States for the construction of a Post Office at East Greenwich, R. I. It also appeared that the United States had cancelled Kaiser's contract under such circumstances as to create a probable cause of action against the United States.

Upon application to the New York State Supreme Court, and after presentation of the facts adduced from Kaiser's

testimony, an order was obtained under Section 795 of the Civil Practice Act authorizing respondent to maintain an action under the Tucker Act, 28 U. S. C., § 41 (20), 24 Stat. 505, against the United States of America for damages arising from the alleged breach of said contract.

In conformity with said order, the instant action was instituted by respondent against the United States of America and Frederick M. Kaiser, the latter being a necessary party defendant required under said Section 795.

Upon the Government's motion in the District Court, the complaint was dismissed (R. 20). On appeal from the order of dismissal, the Court below reversed, with opinion (R. 21-30), reported in 112 F. (2d) 587.

Summary of Argument.

I.

A. The instant action has been properly brought under the Tucker Act. The basis of jurisdiction in the present case would be unquestioned if the present action had been brought by Kaiser instead of respondent. Petitioner contends that the jurisdiction of the District Court is ousted by reason of the fact that the cause of action is now pursued by a judgment-creditor under authorization of the State Court acting under statute, New York Civil Practice Act, § 795.

The action brought is on a single claim against the Government, requiring adjudication of the merits of that claim alone. Contrary to the Government's arguments, there are no issues which remain between respondent and Kaiser as the State Court judgment remains decisive of their status. Counsel for the Government has patently misconstrued the Circuit Court's opinion which states that the alleged debtor of the judgment-debtor is entitled to attack the validity of the order authorizing supplementary proceedings (R. 30). This refers to respondent's right or

title to the cause of action, but in like manner the title or right to a claim against the United States of any third party might be put in issue. As between Sherwood and Kaiser, however, it is a fundamental principle of law, whose application is here conclusive, that a judgment rendered by a Court having proper jurisdiction cannot be collaterally attacked. Where the State Court has the facts before it and may demand any further proof it deems necessary, the order entered permitting the action to be brought by the respondent precludes any question as to the propriety of the action as between judgment-creditor and judgment-debtor.

In any event, the Government's position remains unembarrassed by multiple claims. Under the terms of the order, no other but respondent may enforce it. The reason for making the judgment-debtor a party defendant is to protect him with reference to the amount above the judgment-creditor's claim and to conclude his interest after rendition of judgment.

The present action is not merely a continuation of supplementary proceedings in another court, for here a new and independent cause of action is asserted, having no relation to the judgment which has been obtained against the judgment-debtor, but designed to give the creditor an effective means of pursuing a separate and distinct cause of action of the judgment-debtor.

B. The New Rules of Federal Procedure clearly permit the course here followed. While the Rules do not enlarge the District Court's jurisdiction to entertain suits against the United States, they modify the procedure under which suits may be brought.

Rule 17 (b) gives effect to the procedure employed by affirming respondent's right to sue by reason of the State statute. Respondent's capacity to bring the suit is thus explicit and so remains unless over-ridden by considerations of policy. Petitioner now agrees that the Rules apply to Tucker Act cases, conceding that *Lynn* v. *United States*, 110 F. (2d) 586, is erroneous in holding otherwise.

II.

The present action does not come within the prohibition of R. S., § 3477. The decisions of this Court and the opinion in the Court below affirm respondent's position that the present action, insofar as it is based on any transfer, is concerned with a transfer by operation of law and therefore not made void by the statute.

Petitioner complains that the Government would be embarrassed by the fact that a third party would be suing the Government on a matter in which the Government could not counterclaim or set off any damages it might have against Kaiser, the judgment-debtor. If this argument were sound it would apply with equal force to any case where a claim had been transferred to a third party by operation of law. Furthermore, in the case at bar the provision of the New York statute making the judgment-debtor a party defendant precludes such objection for any such claims existing could be set forth and adjudicated in the same suit. That very possibility was given full consideration by the Court below in suggesting the judicial economy of a consolidation where the United States had already commenced an action against Kaiser.

The policy of the statute is directed against trafficking in claims against the Government, and a transfer by Court order cannot be considered a violation of this principle. This is particularly true where, as under Section 795, jurisdiction is not complete without making the judgment-debtor a party, so that the Government would have full opportunity to enforce any claims it might allege against the original holder of the claim.

III.

The word "person" under Section 795 includes the sovereign. The intendment of Section 795, in view of its purpose, and as treated in related judicial interpretation,

is that both the State and the Government are contemplated thereunder.

I

The action is within the jurisdiction of the District Court under the Tucker Act.

A

AN ACTION BROUGHT UNDER SECTION 795 OF THE NEW YORK CIVIL PRACTICE ACT IS NOT INCONSISTENT WITH THE PROVISIONS OF THE TUCKER ACT.

The New York State Legislature first enacted Section 795 in 1935 in order to give wide powers to a judgment-creditor seeking to pursue a judgment-debtor's claim.[1] The State Court, acting thereunder, upon proof satisfactory to it, could thus empower a judgment-creditor to commence an action against the third person. Such a procedure is not, as petitioner contends, merely a continuation in another guise and in another Court of supplementary proceedings. Rather it is in the nature of an action by a judgment-creditor setting forth an independent cause of action in his name, with the additional requirement that the judgment-debtor be named as a party defendant.

If the judgment-debtor herein, Kaiser, had proceeded in the first instance to sue the United States in his own name, the jurisdictional question would not be raised. Petitioner rests its present objections to the District Court's jurisdiction on the form of the action now brought. The opinion of the Court below so succinctly distinguishes

1. New York Laws 1935, c. 630, known as the Buckley-Holley Act included this section. Section 795 was adopted from Section 792a, New York Laws 1934, c. 645.

The old practice of a creditor's bill in chancery was displaced by supplementary proceedings permitting action by a receiver and under the present statute, in proper case, by the judgment-creditor himself.

the procedural problem involved from the jurisdictional that we respectfully set forth its ruling (R. 25):

> "* * * a distinction should be made between the grant of power to adjudicate a claim against the United States and the manner or procedure by which that power shall be exercised. The statutory provision here, 28 U. S. C. A. § 41 (20), 24 Stat. 505, allows the district court to hear claims 'upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.' This is a general grant of power in the circumstances stated, without limitation as to procedure. Indeed, the statute quoted above, 28 U. S. C. A. § 761, contemplates differences in practice in the two courts. Limitations on procedure in the court of claims, therefore, cannot be jurisdictional defects in the district courts."

While the Tucker Act confers upon the District Courts concurrent jurisdiction with the Court of Claims, 28 U. S. C. A., § 761 indicates the different procedure applicable to the different courts. It is not contended by petitioner that the present claim is not justiciable under the Act, but objection is founded, first, on matters of policy which would rule out a suit by a judgment-creditor, and second, on the alleged failure of the present case to conform to the usual pattern of actions against the Government. As to the former, we shall show that the procedure in the instant case is in full accord with federal policy, and, as to the latter, that the propriety of the form of the action is fully supported by the procedural rules applicable. Under the present point, the right of a judgment-creditor to bring the action by virtue of § 795 of the Civil Practice Act will be discussed.

1. Primary among petitioner's objections is the contention that since the Tucker Act contemplates the single

issue of the liability on the claim against the United States, where a judgment-creditor brings the proceeding, the District Court's jurisdiction must necessarily fall. The Government asserts that issues still remain between the judgment-creditor and the judgment-debtor which must be determined in the present action. In support, petitioner states that the Court below actually adjudicated the issue of the validity of the order authorizing the supplementary proceedings. This, however, is clearly not an issue between judgment-creditor and judgment-debtor, but goes to the basis of the respondent's right or title to bring the present action. As between the judgment-creditor and the judgment-debtor, it is a well-established principle that the judgment or decree of a court of record which has acquired jurisdiction of the subject matter and of the parties cannot be collaterally attacked. *Cuff* v. *United States,* 64 F. (2d) 624. Certiorari denied, 290 U. S. 676; *Jeffery* v. *Selwyn,* 220 N. Y. 77, 84.

If petitioner's argument were upheld, it would constitute an insurmountable objection to all third persons who have any right or title to a claim against the United States, whether acquired by Court order, transferred by a Trustee in Bankruptcy, or bought in at a judicial sale. In all such instances the Government could contest the validity of the judicial proceedings forming the basis of claimant's right of action, but this has not been considered ground for denying such third persons the right to pursue such claims.[2]

---

2. In petitioner's discussion of *Western Pacific R.R. Co.* v. *United States,* 268 U. S. 271 (Pet. Br. p. 47), it is admitted "that the purchaser at such a judicial sale does not necessarily succeed to all the liabilities of the original claimant". Although petitioner denies the possibility of a suit on such claim before any counterclaim by the United States might be resolved, no question was raised as to the validity of the transfer on that ground. Indeed the Court at page 275 speaks of "the sale to the claimant of so much of the claims as had accrued to the receivers"—a clear indication that a final determination of claimant's status was not had.
Also, see infra, pp. 16, 17.

2. Petitioner raises the further objection that supplementary proceedings in aid of execution of the judgment of one Court will not be countenanced in a court of another jurisdiction. The cases cited thereunder (Pet. Br. p. 34) proceed upon the theory of a creditor's bill in equity to recover moneys in another jurisdiction on either a statutory liability of the stockholders or some similar equitable liability. The cases of *Rocky Mountain National Bank* v. *Bliss,* 89 N. Y. 338; *National Tube Works Co.* v. *Ballou,* 146 U. S. 517; *Claflin* v. *McDermott,* 12 Fed. 375, and *Walser* v. *Seligman,* 13 Fed. 415, all hold that the creditor must recover judgment and issue execution in the State where the third party resides before the bill will lie. The refusal to entertain the suits was not based on any question of jurisdiction, but the failure of the creditors to fulfil certain procedural requirements, as a condition precedent to the actions.

The old New York cases were split on the question of whether or not a New York Federal Court judgment could form the basis of a judgment-creditor's action in the State Courts. (See *Davis* v. *Bruns,* 23 Hun [N. Y.] 648; *Tarbell* v. *Griggs,* 3 Paige [N. Y.] 207, holding the action improper; *Wilkinson* v. *Yale,* 6 McLean (N. Y.) 16, contra.) The Federal rule, however, holds that a State Court judgment is sufficient basis for a creditor's bill in the Federal Courts within the jurisdiction. *Feidler* v. *Bartleson,* 161 Fed. 30 (C. C. A. 9th).

3. Petitioner argues that it is entitled to attempt to settle the claims and cross-claims with respect to Kaiser's contract without any meddling by respondent and that respondent having everything to gain and nothing to lose by pursuing the action thereby assumes an obnoxious position. Agreed, that where the Government itself has brought suit, it ordinarily would be to respondent's advantage to pursue the cause of action, and in so doing prevent any settlement between petitioner and Kaiser.[3] But we

3. This would not be strictly true if petitioner would admit a balance due Kaiser, since it might then be in respondent's interest to attempt a settlement. Also see footnote 2 and infra, page 15.

cannot accept the plea that a possible added difficulty to the settlement of the claim can be considered a legal argument against invoking the District Court's jurisdiction.

4. The Government further poses the problem as to the method of entering judgment in the present action, assuming the respondent would prevail. The United States is primarily concerned with the disposal of any claim against it in one action which will remain res adjudicata as to the parties. Sherwood, by Court order, has sole control of the action and any other disposition of the claim has been enjoined. Petitioner does not suggest in its brief that such a conclusive adjudication would not result after a trial in the present case. Any question with regard to a cause of action arising from Kaiser's contract asserted by either party would be disposed of with finality and be res adjudicata. The entire cause of action being in respondent's name, the judgment would be in his favor alone and the District Court would have sole power to enter its own judgment, Section 795 containing no directory provisions in that respect. If necessary, a subsequent State Court order could be entered further disposing of moneys in respondent's hands.

5. Petitioner places great stress on its view that the instant action is in effect a garnishment proceeding and thus outside the realm of Tucker Act jurisdiction. Even assuming that the instant action can be treated as a garnishment, which we do not concede, the Court below most ably reasoned that once consent to be sued is established, the form of suit holds no objection (R. 27).

The extension of the principal of *Federal Housing Administration* v. *Burr*, 309 U. S. 242, to the instant case, it is averred, would subject the United States itself to garnishment as well as governmental corporations. That the applicability of the term "garnishment" to the present action is extremely doubtful, the Court below has shown (R. 27, 28). It is beyond dispute that the present action seeks to establish an independent claim of Kaiser's thus

differing from the ordinary meaning of garnishment. The circumstance that in so proceeding, the Government is sued, cannot be deemed objectionable, since this method of realizing on assets has been upheld when the claim is against the Government as well as in other cases (*Western Pacific R.R. Co.* v. *United States,* 268 U. S. 271).

The more persuasive analogy to Sherwood's position is found in that of a receiver who is given statutory power to bring suit against third-party debtors. The full recognition accorded to such a plaintiff was demonstrated by the decision of this Court in *Converse* v. *Hamilton,* 224 U. S. 243. There an action had been brought by a statutory receiver appointed in Minnesota under a judgment obtained there against a stockholder in the Wisconsin courts in an attempt to enforce the stockholder's liability under an assessment. The highest court of Wisconsin having dismissed the action on the ground that the State statute under which the receiver was appointed could not have extraterritorial force, this Court heard the appeal. In reversing, the Court held that the order appointing the receiver was entitled to full faith and credit, stating at page 255:

> "3. Under this statute, as interpreted by the Supreme Court of the State, as also by this court, the receiver is not an ordinary Chancery receiver or arm of the court appointing him, but a quasi-assignee and representative of the creditors, and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders and with full authority to enforce the same in any court of competent jurisdiction in the State or elsewhere. * * * "

The import of this decision applies with equal force whether or not title to the claim has been transferred. The patent objective of Section 795 being to clothe Sherwood with the right to bring the third party action, and full authority being thereby conferred, his standing must be recognized.

B

THE NEW RULES OF FEDERAL PROCEDURE ESTABLISH RESPONDENT'S RIGHT TO SUE AND THE CONSENT OF THE PETITIONER TO THE SUIT AS BROUGHT.

Rule 17 (b) states:

> "Capacity to sue or be sued.—The capacity of an individual other than one acting in a representative capacity to sue or be sued shall be determined by the law of domicile. * * * "

In consonance with this provision, the lower Court held that the right of respondent to sue as a judgment-creditor is thereby confirmed since the United States consents to the suit in the manner prescribed by New York law. The Court notes the various provisions of the Rules showing clearly that the United States as a party was fully contemplated thereunder, and its rights specially protected (R. 23). Petitioner, too, has now concluded that *Lynn* v. *United States,* 110 F. (2d) 586 (C. C. A. 5th), is erroneous in holding that the Rules are not applicable to actions under the Tucker Act (Pet. Br. p. 31). It asserts, nevertheless, that questions arise out of the form of action, which, irrespective of the Rules, must be resolved in its favor.

1. The first problem deals with the right of plaintiff to maintain the present action. On this count, the argument is made that Rule 17 (b) does not refer to the substantive right of a third person to maintain an action, having reference, rather, to disqualifications of infancy, insanity, alienage and the like. Such an argument would seem without basis upon a consideration of the context. The capacity of a corporation to sue or be sued is set forth thereunder as well as a particular provision enabling a partnership to sue in its common name.

Bicknell v. *Lloyd-Smith,* 109 F. (2d) 527 (C. C. A. 2d), discusses the effect of this section of the Rules upon the

capacity of a receiver to sue. In that case a receiver, appointed under a Michigan statute, sued in the federal district Court of New York, without ancillary appointment in that State. The Court held that by virtue of Rule 17 (b) the action was well brought, since the law of New York permitted a foreign receiver to sue without ancillary appointment, contrary to the Federal practice. In so holding, the Court gives added support to the opinion below where Sherwood acts under a Court order with specific authorization to bring the action.[4]

Petitioner disputes the view of the Court below which indicates consent to the suit by virtue of Rule 17 (b). The right to obtain an order under Section 795 is dependent on a judgment obtained in New York. N. Y. Civil Practice Act, Sec. 773. The question of capacity to sue in the District Courts would then be determined by the law of the judgment-creditor's domicile which would not necessarily be in conflict with New York law. In any event, no anomalous situation would result as petitioner infers.[5]

The consent which the Court below found in the Rules is apart from the recognition which must be accorded Sherwood's position under the doctrine of *Converse* v. *Hamilton,* supra, heretofore considered.

2. The second question concerns the effect of the rules on the joinder of Kaiser as a party defendant with the United States. The jurisdiction of the District Court to determine the claim having been shown, the procedural

4. Other recent cases supporting our view with respect to Rule 17(b) are:

Ballard v. *United Distillers Co., Inc.,* 28 F. Supp. 633;
Pirnie v. *Andrews,* 30 F. Supp. 157;
Alston v. *School Board of City of Norfolk,* 112 F. (2d) 992 (C. C. A. 4th).

The first two cases refer the right of administrators or executors to sue, or be sued, in the federal court of another state, to state law, while the last holds that a voluntary unincorporated association can be sued in its common name.

5. Petitioner's Brief, pages 32, 33; footnote 19.

problem must be answered by the rules pertinent thereto. Primarily, of course, the Conformity Act, 28 U. S. C., § 724, would undertake to conform the federal practice to the procedure outlined by state law. Furthermore, under Rule 19(a) the wide latitude permitted in joinder of parties, even to the extent of permitting the joinder of an involuntary party plaintiff, supports the practice in the case at bar.

Petitioner cites various cases (Pet. Br. p. 16) in the Court of Claims to illustrate the argument that there can be no added party defendant. These cases, without exception, involved additional parties whose rights were at variance with the claimant's, and therefore involved separate issues which the Court of Claims was not enabled by its statutory powers to adjudicate. Thus, the case of *Waite* v. *U. S.*, 57 C. Cls. 549, concerned a third party's attempt to intervene to assert its claim on certain patent rights. The motion was denied on the ground that no provision for intervening parties is made in the Act. Yet, it is highly significant that the present rules of the Court of Claims do provide for intervening parties in certain instances.[6]

Leather & Leigh v. *United States,* 61 C. Cls. 388, and *Jackson* v. *United States,* 27 C. Cls. 74, involved the dismissal of petitions seeking equitable relief not afforded

6. Rules of the Court of Claims of the United States 18 (a) and (b) read as follows:

18 (a). After the filing of a case transmitted to the court by the head of an executive department or by Congress or either House thereof, any person directly interested in the case may appear as a party therein by filing a printed petition, under oath, in accordance with Rules 1 and 8 to 17, inclusive. Such petition shall be filed within 6 months from the filing of the case in this court, and shall not be filed thereafter except by leave of court.

(b). Any person claiming to be in lirectly interested in any question involved in such case may appear and be heard on the one side or the other, as his interest may require, upon filing a printed petition, under oath, setting forth specifically and concisely how he claims to be interested, and submitting the questions raised to the decision of the court.

by the Court of Claims' jurisdictional power. However, joinder of Kaiser here would not instill new issues nor affect the District Court's jurisdiction. The broad procedural province of the District Court and the rules governing actions therein fully support the procedure herein followed.

Naming Kaiser as a party defendant does not alter or destroy the underlying purpose of the Tucker Act. Indeed, this procedural requirement seems particularly advantageous in that Kaiser is before the Court subject to any counterclaim the United States may wish to assert. Thus, all the issues could be determined in a single action, a result which the Court below so strongly urged in support of the propriety of the original consolidation had herein (R. 22). Clearly, when the sole issue for adjudication is the question of the breach of Kaiser's contract, the action does not run counter to either the language or purport of the Act.

II

The present action does not come within the prohibition of R. S. § 3477.

Respondent herein brings the present action by order of the State Court authorizing him to maintain the action against petitioner. In so proceeding under the order, respondent acts as an agent of the Court, the entire claim and cause of action being in the custody of the Court. Whatever may be realized on the claim would be distributed under Court order to creditors entitled thereto, or if a balance remained, to Kaiser himself.

The principle is clear that if a transfer is made by operation of law, the claim brought thereon is not in violation of R. S. § 3477, a doctrine enunciated in *Erwin v. United States*, 97 U. S. 392, and numerous cases thereafter.

Petitioner apparently does not regard the question of transfer by operation of law as all-important, but rather dwells on the dominant purposes of R. S. § 3477, claimed to be violated by Sherwood's action. These purposes, it is maintained, are to prevent the Government from being harassed by multiplying the number of persons with whom it must deal and from being involved in conflicting claims.

To support its position petitioner again argues that because of the form of the present action, the Government must deal with Kaiser as well as respondent. Respondent, it should be pointed out, is the only person authorized to pursue this claim against the United States, and it is with him alone that the Government has to deal. To assume otherwise would be to make the order of the State Court a nullity. The Government, furthermore, ignores the practical consideration which is raised by the facts in the instant case, namely, that suit has been brought against Kaiser and his surety (R. 5-6) claiming a breach of contract, at the same time that the present action is pending. If these actions were consolidated in conformity with the suggestion of the Court below, the single issue would be raised of whether the Government or Kaiser was guilty of the breach. Once this had been decided, damages necessarily flowing therefrom would be determined. Petitioner, however, would not be content with such a result, for, because of respondent's position in the melee, the possibility of compromise with the surety, assuming Kaiser to be judgment proof, becomes highly questionable.

We seriously doubt whether the fact that the Government would have more difficulty in settling a claim because of its own action can be considered as a valid legal reason for application of the statute. By commencing an action against Kaiser and his surety, clearly the Government considers its case a meritorious one, and, consequently, sees no merit in the present action. The difficulty of settlement here surely does not constitute an

interference "with the examination and allowance or rejection of such claim", nor otherwise obstruct legal action by officers of the Government, referred to by petitioner in its brief, page 48, in the citation from *Price* v. *Forrest*, 173 U. S. 410.

It will be seen from petitioner's discussion of *Western Pacific R.R. Co.* v. *United States*, 268 U. S. 271 (Pet. Br. p. 47, fn. 21), that the purchaser of the assets at a judicial sale does not necessarily succeed to all the liabilities of the original claimant. Would not this very argument which the Government now raises be applicable to the facts in the *Western Pacific* case? The purchaser in that case bought in at the receiver's sale only so much of the claims against the United States as had accrued to the receiver. No reason is given why the purchaser would have been subject to counterclaims by the Government, yet the Court saw no objection to the action as there brought.

The true purpose of R. S. § 3477 is set forth in the *Western Pacific R.R.* case, supra, the Court stating at page 275:

> "* * * The object of this section is to protect the Government and prevent frauds upon the Treasury. It applies only to cases of voluntary assignment of demands against the Government, and does not embrace cases where there has been a transfer of title by operation of law. United States v. Gillis, 95 U. S. 407, 416; Erwin v. United States, 97 U. S. 392, 397; Goodman v. Niblack, 102 U. S. 556, 560; Price v. Forrest, 173 U. S. 410, 421. And see Seaboard Air Line v. United States, 256 U. S. 655, 657. In Price v. Forrest, supra, p. 422, it was specifically held that this section did not apply to the assignment of a claim to a receiver under the order of a court, this being 'the act of the law'. So here the sale to the claimant of so much of the claims as had accrued to the receivers for transportation furnished by them was clearly a transfer by operation of law and did not come within the prohibition of the statute."

As in the *Western Pacific* case, the claim in the case of *In re Pottasch Bros. Co.*, 79 F. (2d) 613 (C. C. A. 2d), had likewise not yet been allowed when the transfer was made. From a careful reading of the opinion in the District Court it will be seen that the validity of a transfer by the Trustee in Bankruptcy of the claims against the United States at a time when they had not yet been allowed had been called into question.[7] Nevertheless, both in the first instance and on appeal R. S. § 3477 was held inapplicable.

In the aforementioned cases the Courts did not point out any necessity for a complete transfer of all of the claimant's property to the third party or indicate a requirement that the claims be allowed by the Government at the time of the transactions. See, also, *Bray* v. *United States Fidelity & Guaranty Co.*, 267 Fed. 533, *In re Gerstenzang*, 5 F. Supp. 904.

Any question as to whether or not the order of a State Court is of the same juridic effect as an order of a Federal Court was resolved in the case of *Price* v. *Forrest*, 173 U. S. 410. That case involved a suit on a claim which, while it had already been allowed, had been transferred by an order of the State Court of New Jersey. This Court held that the order thus made was not a violation of the statute, the opinion reading at pages 424, 425 as follows:

> "It only remains to say touching this part of the case that if Section 3477 does not embrace the passing or transfer of claims to heirs, devisees or assignees in bankruptcy, as held in Erwin v. U. S., nor a voluntary assignment by a debtor of his effects for the benefit of his creditors, as held in

7. The lower's Court's decision in *In Re Pottasch Bros. Co.*, 11 F. Supp. 275, at page 276, states:

> "At the time of these transactions the Trustee had no knowledge of the existence of the bankrupt's claims against the United States, beyond the constructive notice given by the proof of claim filed by the Central Illinois Company. * * * Later it was learned that the claims against the United States had been allowed."

Goodman v. Niblack, it is difficult to see how an order of a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government and ordering the claimant to assign the same to such receiver to be held subject to the order of Court for the benefit of those entitled thereto can be regarded as prohibited by that section."

The purpose of R. S. § 3477 has been shown to be twofold: Firstly, to prevent such trafficking in claims of the Government which would permit transfer without orderly legal procedure, and secondly, to prevent a multiple assertion of claims. Neither of these fundamentals have been violated in the proceedings in the case at bar.

III

The word "person" under Section 795 includes the sovereign.

We believe that the opinion in the Court below (R. 29-30) on this point is both authoritative and decisive, requiring little comment here. The fallacy must be pointed out, however, in the attempt made by the Government to relate decisions respecting Section 684 of the Civil Practice Act to the present action. Section 684, as amended in 1935, now permits the garnishment of moneys due City and State employees and is quite properly held not to apply to the employees of the United States. This is the inevitable result where there is no Federal statute providing for such garnishment, nor any waiver of sovereign immunity. An action brought under the Tucker Act rests on a statutory consent which we have endeavored to show is applicable to the instant action. The remedial purpose of Section 795 can only be given effect if its incidence falls on the largest possible sphere. New York State statutory enactments show the unquestioned enlargement of the scope wherein a judgment-creditor may seek

relief, which now includes garnishment proceedings against State or Municipal employees, Civil Practice Act, Section 684. It follows as the necessary result of the object of the legislation, that the sovereign is included within the word "person" in Section 795.[8]

Nor can it be said that including the sovereign would "deprive the sovereign of a recognized or established prerogative, title or interest" under the holding of *Nardone* v. *United States*, 302 U. S. 379, 383. If this Court rules that this action is not violative of R. S., § 3477, such a finding would in effect hold that the Government cannot object to the claim because of any embarrassment to it or because of Sherwood's failure to establish his legal right to sue. Thus, the argument that no inroad is made on governmental prerogative by the inclusion would be strongly reinforced.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

MILTON U. COPLAND,
DAVID MORGULAS.

8. The entire Article 45 of the N. Y. Civil Practice Act dealing with supplementary proceeding was repealed and replaced by a new article, L. 1935, Ch. 630.

APPENDIX.

28 U. S. C. A., § 761, states: The course of procedure for the district courts and the court of claims in cases under section 41, paragraph 20, and section 250 of this title, insofar as applicable and not inconsistent with sections 762 to 765, and the procedure prescribed for the court of claims shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

Rule 19(a) of the Federal Rules of Civil Procedure. Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

28 U. S. C., Sec. 724: The practice, pleadings and forms and mode of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of this State within which such district courts are held, any rule of court to the contrary notwithstanding.

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SUPREME COURT OF THE UNITED STATES.

No. 500.—October Term, 1940.

The United States of America, Petitioner, *vs.* Jacob L. Sherwood.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 31, 1941.]

Mr. Justice Stone delivered the opinion of the Court.

The New York Supreme Court, acting under authority of § 795 of the New York Civil Practice Act, made an order authorizing respondent, as a judgment creditor, to maintain a suit under the Tucker Act of March 3, 1887, 24 Stat. 505, § 24(20) of the Judicial Code, 28 U. S. C. § 41(20), to recover damages from the United States for breach of its contract with the judgment debtor. The question for decision is whether a United States District Court has jurisdiction to entertain the suit.

The order authorized respondent, who had recovered a judgment against Kaiser in the New York Supreme Court for $5,567.22, to bring suit against the Government to recover for breach of its contract with Kaiser for the construction of a postoffice building. The order directed that out of the amount recovered respondent should be entitled to a sum sufficient to satisfy his judgment with interest "as well as costs, disbursements and expenses which may be allowed by the court".

Respondent brought the present suit against the United States and Kaiser in the District Court for Eastern New York. By his complaint he set up the judgment and the order of the state court, the breach of contract by the United States, and the consequent damage to Kaiser in the sum of $14,448.49, and prayed judgment in the sum of $10,000. The order of the District Court dismissing the complaint for want of jurisdiction was reversed by the Circuit Court of Appeals for the Second Circuit, 112 F. (2d) 587, which held that under Rule 17(b) of the Federal Rules of Civil Procedure respondent's "capacity to sue" was governed by the law

of New York which was his domicile; and that the order of the state court had conferred authority upon respondent to maintain the suit, the United States being a "person indebted" within the meaning of §.795 of the Civil Practice Act which sanctions orders by the state court authorizing a suit by a judgment creditor against a "person . . . indebted to the judgment debtor". We granted certiorari November 18, 1940, the question of the jurisdiction of the District Court under the Tucker Act being of public importance.

The United States, as sovereign, is immune from suit save as it consents to be sued, *United States* v. *Thompson,* 98 U. S. 486; *United States* v. *Lee,* 106 U. S. 196; *Kansas* v. *United States,* 204 U. S. 331; *Minnesota* v. *United States,* 305 U. S. 382, 387; *Keifer & Keifer* v. *Reconstruction Finance Corporation,* 306 U. S. 381, 388; *United States* v. *Shaw,* 309 U. S. 495. See cases cited in *The Pesaro,* 277 F. 473, 474, *et seq.,* and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. *Minnesota* v. *United States, supra,* 388 and cases cited; cf. *Stanley* v. *Schwalby,* 162 U. S. 255, 270. Jurisdiction to entertain suits against the United States to recover damages for breach of contract and certain other specified classes of claims was conferred on the Court of Claims by Act of February 24, 1855, 10 Stat. 612. With additions not now material, the jurisdiction was continued by paragraph First of the Tucker Act of March 3, 1887, 24 Stat. 505, which, as supplemented and reenacted, is now § 145 of the Judicial Code, 28 U. S. C. § 250. Section 2 which, as supplemented and reenacted, is now § 24(20) of the Judicial Code, 28 U. S. C. § 41(20), confers jurisdiction on the district courts "Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded . . . . upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable . . ."

The Court of Claims is a legislative, not a constitutional court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power "to pay the debts . . . of the United States", which it is free to exercise through judicial as well as non-judicial agencies. See

Williams v. *United States*, 289 U. S. 553, 569, 579; *Ex parte Bakelite Corporation*, 279 U. S. 438, 452, *et seq.* It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress, despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims. *McElrath* v. *United States*, 102 U. S. 426; *Williams* v. *United States*, *supra*, 570, 571; *Ex parte Bakelite Corporation*, *supra*, 453.

Except as Congress has consented there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States, or for the review of its decisions by appellate courts. *Luckenbach Steamship Co.* v. *United States*, 272 U. S. 533, 536, *et seq.* For that reason it has been uniformly held, upon a review of the statutes creating the court and defining its authority, that its jurisdiction is confined to the rendition of money judgments in suits brought for that relief against the United States, *United States* v. *Alire*, 6 Wall. 573; *United States* v. *Jones*, 131 U. S. 1, and if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court. *United States* v. *Jones*, *supra*; *Lynn* v. *United States*, 110 F. (2d) 586, 588; *Leather & Leigh* v. *United States*, 61 Ct. Cl. 388, or if its maintenance against private parties is prerequisite to prosecution of the suit against the United States the suit must be dismissed. *Jackson* v. *United States*, 27 Ct. Cl. 74, 84; *Waite* v. *United States*, 57 Ct. Cl. 546; *Leather & Leigh* v. *United States*, *supra*; cf. *Turner's Case*, 248 U. S. 354; *Green* v. *Menominee Tribe*, 233 U. S. 558. See *Pacific Mutual Life Insurance Co.* v. *United States*, 44 F. (2d) 887, 888.

We think it plain that the present suit could not have been maintained in the Court of Claims because that court is without jurisdiction of any suit brought against private parties and because adjudication of the right or capacity of respondent to proceed with the suit upon the contract of the judgment debtor with the United States is prerequisite to any recovery upon the Government contract. As the court below recognized, the judgment debtor, who is made a necessary party by § 795 of the Civil Practice Act, in any suit brought pursuant to the order of the state court is entitled to attack the validity of the order and of the judgment on which it is founded. See *Nankivel* v. *Omsk All Russian Government*, 237

N. Y. 150, 158. Adjudication of that issue is not within the jurisdiction of the Court of Claims whose authority, as we have seen, is narrowly restricted to the adjudication of suits brought against the Government alone.

But the question remains whether such a suit is nevertheless within the jurisdiction conferred by the Tucker Act on the district courts. The Court of Appeals thought that the obstacles to joining private parties, as parties defendant, in suits against the Government are procedural only, and that while no procedure is provided whereby the Court of Claims can adjudicate the rights of private parties in suits against the Government, that court is nevertheless free to adopt such a procedure. Cf. 28 U. S. C. § 263. In any case it thought such procedure has now been made applicable to suits in the district courts by the new rules of civil practice. It concluded that since the District Court, under the Tucker Act has jurisdiction to adjudicate claims against the United States and by virtue of other provisions of the Judicial Code has jurisdiction to adjudicate the issues between respondent and the judgment debtor, the Rules of Civil Procedure authorize the exercise of both jurisdictions in a single suit.

This conclusion presupposes that the United States, either by the rules of practice or by the Tucker Act or both, has given its consent to be sued in litigations in which issues between the plaintiff and third persons are to be adjudicated. But we think that nothing in the new rules of civil practice so far as they may be applicable in suits brought in district courts under the Tucker Act authorizes the maintenance of any suit against the United States to which it has not otherwise consented. An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. 723, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts.

Nor with due regard to the words of § 2 of the Tucker Act and to its legislative history can we say that the United States has consented to the maintenance of suits against the Government in the district courts which could not be maintained in the Court of Claims. The section must be interpreted in the light of its func-

tion in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted. *Schillinger* v. *United States,* 155 U. S. 163; *Price* v. *United States,* 174 U. S. 373; *United States* v. *Michel,* 282 U. S. 656; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *United States Fidelity & Guaranty Co.,* 309 U. S. 506; cf. *Federal Housing Administration* v. *Burr,* 309 U. S. 242, 247. Section 2, authorizing suits against the Government in district courts, is an integral part of the statute, other sections of which revised and enlarged the classes of claims against the United States which could be litigated in the Court of Claims. It was the jurisdiction thus defined and established for that court which was extended by the section to the district courts in the specified instances, for in consenting to suits against the Government in the district courts, Congress prescribed that the jurisdiction thus conferred should be "concurrent" with that of the Court of Claims.

Construing the statutory language with that conservatism which is appropriate in the case of a waiver of sovereign immunity and in the light of the history of the Court of Claims' jurisdiction to which we have referred, we think that the Tucker Act did no more than authorize the District Court to sit as a court of claims and that the authority thus given to adjudicate claims against the United States does not extend to any suit which could not be maintained in the Court of Claims. See *United States* v. *Jones, supra,* 19; *United States* v. *Pfitsch,* 256 U. S. 547, 550; cf. *Bates Mfg. Co.* v. *United States,* 303 U. S. 567, 571. The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure which prescribe the methods by which the jurisdiction of the federal courts is to be exercised, but do not enlarge the jurisdiction.

The present litigation well illustrates the embarrassments which would attend the defense of suits brought against the Government if the jurisdiction of district courts were not deemed to be as restricted as is that of the Court of Claims. The Government, to protect its interests, must not only litigate the claim upon which it

has consented to be sued, but must make certain that respondent's right, as against the judgment debtor, to maintain the suit is properly adjudicated. And since the alleged claim for damages is larger than the $10,000 jurisdictional amount the Government must either be subjected to successive suits for partial recoveries of the amount due or must make certain that respondent has legal authority to relinquish the judgment debtor's claim in excess of $10,000, and that this has been accomplished by the limitation of his demand for judgment to that amount. See *Franklin* v. *United States*, 308 U. S. 516; *Otis Elevator Co.* v. *United States*, 18 F. Supp. 87. The Government's consent to litigate such issues is hardly to be inferred from its consent to be sued upon a claim for damages for breach of contract. Cf. *National Surety Co.* v. *Washington Iron Works*, 243 F. 260.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.